

No. 14 at 6. To support this argument, Plaintiff relies primarily on authority from the Eastern District of California. *See id.* at 6 (citing *Atain Specialty Ins. Co. v. Slocum*, No. 1:19-CV-0247 AWI SKO, 2019 WL 2917729, (E.D. Cal. July 8, 2019)). However, the dispute at issue in *Atain* involved private parties. *See* 2019 WL 2917729. In contrast, the present suit involves a sovereign entity, the United States.

The Ninth Circuit’s opinion in *Fidelity & Cas. Co. v. Reserve Ins. Co.*, 596 F.2d 914 (9th Cir. 1979), is instructive here. *Fidelity* involved a set of facts that is generally analogous to those presently before this Court. In *Fidelity*, the United States sued one of Fidelity’s insureds to recover damages for a fire on federal land. *See* 596 F.2d at 916. Fidelity then sued one of its insured’s other insurers seeking a declaratory judgment clarifying which insurer was implicated in the suit, and also named the insured and the United States as defendants. *See id.* The Ninth Circuit grounded its analysis in 28 U.S.C. § 1345⁵ and found that it lacked jurisdiction over the United States. *See id.* at 916–17. The court reasoned that while the United States “may subject itself to various compulsory and permissive counterclaims” when it files suit, there was no precedent “in which jurisdiction has been extended to a separate suit.” *Id.* at 917 (footnote and citations omitted). The court dismissed the United States on the grounds that it was not an indispensable party because it was “neither the insured nor the insurer; it is, at best, an unnamed contingent beneficiary of the policies.” *Id.* at 918.

The *Fidelity* court also considered the validity of exercising jurisdiction over the United States on California Insurance Code section 11580(b)(2). Basing its argument on section 11580(b)(2), which requires insurance policies to include a provision allowing

property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

§ 11580(b)(2).

⁵ Section 1345 addresses federal courts’ jurisdiction over suits brought by the United States as a plaintiff and provides in pertinent part: “Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States.” 28 U.S.C. § 1345.

1 judgment creditors to sue insurers to recover for “bodily injury, death, or property
2 damage,” the defendant insurer contended that “the only way a complete declaratory
3 judgment, binding upon all the parties including the United States” could be granted was
4 for a federal court to exercise jurisdiction. *Fidelity*, 596 F.2d at 917, 917 n.2. Further, it
5 argued that issuing a declaratory judgment that was not binding on the United States
6 would leave it free to subsequently sue the insurers regardless of the outcome of the
7 declaratory action. *See id.* at 917 n.2. The Ninth Circuit responded as follows:

8
9 While this may be true, the government’s right to sue arises only
10 after judgment has been obtained against the insured. If the
11 insurers wished to avoid the possibility of inconsistent
12 adjudications regarding coverage they might have waited to be
13 sued by the United States . . . or sought to intervene in the action
14 commenced by the United States. When *Fidelity* filed a separate
15 lawsuit, rather than seeking to intervene in the government’s
16 action, it voluntarily abandoned its best argument for waiver of
17 sovereign immunity and the existence of federal subject matter
18 jurisdiction.

19 *Id.* at 917 n.2.

20 While *Fidelity* makes clear that Plaintiff would have had jurisdiction over the
21 United States, as well as means of overcoming sovereign immunity, had it intervened in
22 the United States’ suit against Nelson, it has not done so. *See id.* at 917–18. As a result,
23 it has “voluntarily abandoned its best argument for waiver of sovereign immunity and the
24 existence of federal subject matter jurisdiction.” *Id.* at 917 n.2. *Fidelity* also forecloses
25 any possibility of Plaintiff alleging jurisdiction based on section 1345, which is relevant
26 because, as discussed below, Plaintiff may not assert jurisdiction over the United States
27 under section 1332. *See Fidelity*, 596 F.2d at 916–18.

28 Furthermore, even though the *Fidelity* court acknowledged that a controversy
existed in the case before it, and “that the United States [was] a proper party defendant”
in that case as well, the court nevertheless declined to exercise jurisdiction over the

1 United States.⁶ *See id.* at 918 (“All the same, it does not follow that resolution of the
 2 controversy between the insurers is reasonably required for a complete determination of
 3 the original suit by the United States against the insured.”). *Fidelity* also undermines
 4 Plaintiff’s reliance on California Insurance Code section 11580(b)(2). *See id.* at 917;
 5 Doc. No. 14 at 6. Even if “bodily injury, death, or property damage” within the meaning
 6 of section 11580(b)(2) encompasses a suit for discrimination brought by the United States
 7 under the Fair Housing Act, the Court need not decide that issue in order to dispose of
 8 Plaintiff’s argument. After all, the Ninth Circuit declined to extend jurisdiction over the
 9 United States in *Fidelity* where the United States’ underlying claim was for property
 10 damage. *See* 596 F.2d at 916, 917–18. Accordingly, the Court rejects Plaintiff’s
 11 argument that jurisdiction may be exercised because of section 11580(b)(2).

12 Finally, it is axiomatic that an action for declaratory relief against the United States
 13 “must also fulfill statutory jurisdictional prerequisites.” *Dizol, supra*, 133 F.3d at 1222–
 14 23 (citing *Skelly Oil v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950)). The Supreme
 15 Court has made clear that section 702 of the APA does not provide an independent
 16 conferral of jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 104–07 (1977). As such,
 17 Plaintiff must meet the requirements of 28 U.S.C. § 1332, the only other statutory basis
 18 upon which it alleges this Court has subject matter jurisdiction. *See* Doc. No. 1 ¶¶ 1–2.
 19 But Plaintiff’s invocation of jurisdiction over the United States under 28 U.S.C. § 1332 is
 20

21
 22 ⁶ The Ninth Circuit cited to two cases to support the conclusions regarding the existence of a controversy
 23 and the United States’ status as a proper defendant—*Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312
 24 U.S. 270 (1941) and *Franklin Life Ins. Co. v. Johnson*, 157 F.2d 653 (10th Cir. 1946). *See Fidelity*, 596
 25 F.2d at 918. However, the Court declines to give these references persuasive weight in the present case
 26 for the following reasons. First, the Ninth Circuit’s reference to these cases in *Fidelity* was dicta and as
 27 such is not binding on this Court. *See id.* Second, neither of the cases cited in *Fidelity* involved disputes
 28 to which the United States was a party. *See Md. Cas. Co.*, 312 U.S. 270; *Johnson*, 157 F.2d 653. Third,
 both cases involved cases where there were parallel proceedings between state and federal courts. *See*
Md. Cas. Co., 312 U.S. at 271, 274; *Johnson*, 157 F.2d 655–56. As such, both cases invoked concerns
 that are not at play here. *See id.* Finally, the Court has found a plethora of reasons to dismiss the United
 States from this suit. Even if the Court were to delve deeper into the general principles espoused by these
 cases, it would not change the outcome. Therefore, the Court declines to engage in further analysis on
 this point.

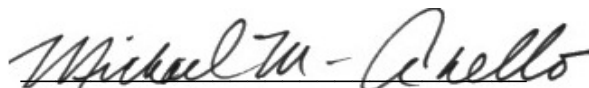
fatally flawed. *See* Doc. No. 1 ¶¶ 1–2. Section 1332 requires, among other things, that the parties to a suit be “[c]itizens of different states.” However, “the United States is not a citizen for diversity purposes” and cannot be sued under section 1332. *See Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 584 (D.C. Cir. 1993). Thus, Plaintiff’s assertion of diversity jurisdiction over the United States presents sufficient grounds by itself to dismiss the United States from this action.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** the United States’ motion to dismiss for lack of subject matter jurisdiction. Dismissal is without prejudice and without leave to amend. *See Mo. ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017); *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999) (order) (“Dismissals for lack of jurisdiction should be without prejudice so that a plaintiff may reassert his claims in a competent court.” (internal quotation marks and ellipsis omitted)); *Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083, 1088 (9th Cir. 2002) (affirming trial court’s denial of leave to amend where plaintiffs could not cure a basic flaw in their pleading). Accordingly, the Court **DIRECTS** the Clerk of Court to terminate this action as to the United States.

IT IS SO ORDERED.

DATED: June 24, 2020



HON. MICHAEL M. ANELLO
United States District Judge

Applicant Details

First Name **Molly**
 Middle Initial **A**
 Last Name **Rosen**
 Citizenship Status **U. S. Citizen**
 Email Address mar416@georgetown.edu

Address	Address Street 2125 14th Street NW, 902 City Washington State/Territory District of Columbia Zip 20009 Country United States
---------	---

Contact Phone Number **3109234505**

Applicant Education

BA/BS From **University of Michigan-Ann Arbor**
 Date of BA/BS **May 2014**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **May 23, 2021**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Georgetown Law Technology Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **George Mason University Antonin Scalia School of Law Internal Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **Yes**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

Epstein, Deborah
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2026629675
Carroll, Erin
ecc66@law.georgetown.edu
DeRosa, Mary
mbd58@law.georgetown.edu
202-841-2415

References

Ms. Amy Marshak
Managing Director, Institute for Constitutional Advocacy &
Protection, Georgetown University Law Center
Phone: (202) 662-9075
Email: As3397@georgetown.edu

Mr. Timothy Howard
Co-Chief, Complex Frauds and Cybercrime Unit
United States Attorney's Office for the Southern District of New York,
Criminal Division
Phone: (212) 637-2308
Email: Timothy.howard@usdoj.gov

Mr. Ryan Dickey
Trial Attorney, Computer Crime & Intellectual Property Section
The United States Department of Justice, Criminal Division

Phone: (212) 616-1509

Email: ryan.dickey@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MOLLY A. ROSEN

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June 7, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Magistrate Judge Hanes,

I recently graduated from the Georgetown University Law Center where I acted as the Solicitations Editor for the *Georgetown Law Technology Review*. I am writing to apply for the 2022-2024 term clerkship in your chambers. I have significant courtroom experience as a student attorney, judicial extern, and paralegal. I am eager to continue pursuing my interests in litigation as a judicial clerk for your chambers, and I remain excited about the idea of continuing my legal journey in the DMV region.

As a paralegal I developed a keen eye for detail and an ability to flawlessly execute tasks in high-pressure and fast-paced environments. While at SDNY, my casework focused on cyber and financial intrusions, and my responsibilities involved facilitating investigation and trial logistics with multiple agents from several federal agencies, attorneys and unit chiefs, opposing counsel, judicial chambers, and witnesses. I coordinated the transfer of evidence and research among these stakeholders, and drafted hundreds of official court documents. While at Quinn Emanuel, I assisted attorneys—both local and abroad—with internal investigations for international clients. Both experiences solidified my desire to pursue a legal career and instilled in me a significant appreciation for the new challenges our justice system faces in a digital world.

In law school I explored the application of blueprint legal concepts to this century's challenges. Such pursuits led me to the DOJ Criminal Division's Computer Crime and Intellectual Property Section, where I drafted official DOJ legal policy memoranda for cybercrime prosecutors around the nation. Last summer I continued my work on the intersection of law and technology as a summer associate for Debevoise & Plimpton, LLP, where I developed stronger general litigation skills. And this past fall I applied lessons learned from these experiences to my work as a student attorney in the Georgetown Law Domestic Violence Clinic, where I represented clients seeking protection orders in the D.C. Superior Court.

My experiences working for all parties in a courtroom have solidified my desire to pursue a judicial clerkship in your chambers. Specifically, my time working for Judge Friedman's chambers taught me that successful litigators not only have strong research, writing, and oral advocacy skills, but also collaborate effectively, advocate passionately, and solve problems diligently. The opportunity to continue to comprehensively answer difficult legal questions, observe attorneys in a courtroom and internalize their best practices, and learn from distinguished professionals excites me.

Thank you in advance for your time and consideration reviewing my application. I have enclosed the following for your review: my resume, writing sample, transcripts, and letters of recommendation from Professor Erin Carroll, Professor Mary DeRosa, and Professor Deborah Epstein. Please let me know if I can provide you with anything else and I look forward to hearing from you.

Sincerely,
Molly Rosen

MOLLY A. ROSEN

2125 14th Street NW, Washington, D.C. 20009
(310) 923-4505 • mar416@georgetown.edu

EDUCATION

Georgetown University Law Center Washington, D.C.
GPA: 3.68 May 2021
Honors: Fall 2020 Dean's List (GPA: 3.88); Spring 2021 (forthcoming)
Experiences: Georgetown Law Technology Review, *Senior Solicitations Editor*; Faculty-Student Journal Committee, *Member*
Domestic Violence Clinic, *Student Attorney*; Institute for Constitutional Advocacy Protection, *Practicum Student*

Antonin Scalia Law School at George Mason University Arlington, VA
First-year J.D. coursework completed, GPA: 3.51 2018 – 2019
Honors: The International Legal Honor Society of Phi Delta Phi, Student Member
Highest Grade Distinctions: Legal Research, Writing, & Analysis I (Fall 2018) & II (Spring 2019)
Activities: Moot Court Board, *Member*; Trial Advocacy Association Board, *Member*

University of Michigan Ann Arbor, MI
Bachelor of Arts, Political Science & Judaic Studies May 2014
Honors: Michigan Tradition Scholar

EXPERIENCE

Debevoise & Plimpton, LLP Washington, D.C.
Summer Associate & Expected Full-Time Associate in October 2021 July 2020 – Aug. 2020

- Drafted cybersecurity risk assessment models to ensure compliance with multiple regulators
- Researched and wrote various memoranda on current cybercrime legal issues

The Honorable Paul L. Friedman, U.S. District Court for the District of Columbia Washington, D.C.
Judicial Intern Jan. 2020 – April 2020

United States Department of Justice, Criminal Division Washington, D.C.
Legal Intern, Computer Crime & Intellectual Property Section (CCIPS) June 2019 – Aug. 2019

- Researched and wrote department interpretations of the Computer Fraud & Abuse Act
- Conducted legal research & drafted correspondence for major cybercrime investigations and trials
- Drafted internal CCIPS and DOJ Criminal Division cyber policy memoranda

Quinn Emanuel Urquhart & Sullivan, LLP Washington, D.C.
Paralegal, Investigations, Government Enforcement, & White-Collar Criminal Defense Practice Aug. 2017 – July 2018

- Managed key legal & factual research for a variety of high-profile litigation matters for international clients
- Executed on-site internal investigations at client offices abroad
- Drafted, reviewed, and revised legal memoranda regarding witness testimony and legal analysis

Embassy of Israel to the United States Washington, D.C.
Social Secretary and Chief Protocol Officer, Office of the Ambassador June 2016 – Aug. 2017

- Researched, strategized, and implemented the Ambassador's complex external relations program, which required an acute attention to detail, ability to balance conflicting demands in a high-stakes environment, continuous development of over 3,000 national and international contacts, and the facilitation of hundreds of official events
- Managed the Ambassador's residence and residence staff, acted as liaison to the Executive Office team, and coordinated daily functions for the Ambassador's wife and family

United States Attorney's Office for the Southern District of New York, Criminal Division New York, NY
Paralegal Specialist, Cybercrime & Complex Fraud Unit Sept. 2014 – June 2016

- Located, managed, and analyzed evidence for dozens of high-profile federal investigations and trials involving cybercrime and securities fraud, and drafted and served court orders
- Ensured flawless production of case materials for all stakeholders in high-pressure situations, through coordination and collaboration with Assistant United States Attorneys, federal agents from multiple agencies (including USSS, FBI, DHS, IRS, and DEA), and court officials
- Served as the paralegal in the trial of Ross Ulbricht, founder of the Silk Road
- Testified as a summary witness in multiple trials because of successful research and digital analysis

Language skills: Conversational proficiency in Modern Hebrew

Community Involvement: Speaker for the Jewish Federations of North America Speaker's Bureau

Interests: Long-distance running; annual National Park tours; Middle Eastern cooking; yoga

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Molly Adina Rosen
 GUID: 834216231

Course Level: Juris Doctor

Transfer Credit:
 George Mason University
 School Total: 30.00

Entering Program:
 Georgetown University Law Center
 Juris Doctor
 Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	004	05	Constitutional Law I: The Federal System	3.00	B	9.00	
			Nicholas Rosenkranz				
LAWJ	128	08	Criminal Procedure	2.00	B+	6.66	
			Brent Newton				
LAWJ	1354	05	Best Practices for Justice: Prosecutors Working to Improve the Criminal Justice System	4.00	A	16.00	
			Kristine Hamann				
LAWJ	165	07	Evidence	4.00	B+	13.32	
			Gerald Fisher				
LAWJ	1674	05	The Persuasive Narrative Seminar	1.00	A	4.00	
			Erin Carroll				
			EHrs QHrs QPts GPA				
Current			14.00 14.00 48.98 3.50				
Cumulative			44.00 14.00 48.98 3.50				
Spring 2020							
LAWJ	1457	05	Technology Law and Policy Colloquium: Information Platforms	3.00	P	0.00	
			Julie Cohen				
LAWJ	1491	101	~Seminar	1.00	P	0.00	
			Arun Rao				
LAWJ	1491	103	~Fieldwork 3cr	3.00	P	0.00	
			Arun Rao				
LAWJ	1491	26	Externship I Seminar		NG		
			Arun Rao				
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties	4.00	P	0.00	
			Girardeau Spann				
LAWJ	361	05	Professional Responsibility	2.00	P	0.00	
			Stuart Teicher				
Mandatory P/F for Spring 2020 due to COVID19							
			EHrs QHrs QPts GPA				
Current			13.00 0.00 0.00 0.00				
Annual			27.00 14.00 48.98 3.50				
Cumulative			57.00 14.00 48.98 3.50				

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1085	05	Sentencing Law and Policy	2.00	A-	7.34	
			Mark MacDougall				
LAWJ	1127	08	Cyber and National Security: Current Issues Seminar	2.00	A	8.00	
			Mary DeRosa				
LAWJ	518	06	Domestic Violence Clinic		NG		
			Deborah Epstein				
LAWJ	518	81	~Skills Development	4.00	A	16.00	
			Rachel Camp				
LAWJ	518	82	~Educational Commitment	3.00	A-	11.01	
			Rachel Camp				
LAWJ	518	83	~Commitment to the Lawyering Role	3.00	A	12.00	
			Rachel Camp				
Dean's List Fall 2020							
			EHrs QHrs QPts GPA				
Current			14.00 14.00 54.35 3.88				
Cumulative			71.00 28.00 103.33 3.69				
Spring 2021							
LAWJ	121	05	Corporations	4.00	A-	14.68	
			Russell Stevenson				
LAWJ	1471	05	Intellectual Property for Start-ups	1.00	P	0.00	
			Jonathan Cohen				
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum)	5.00	A-	18.35	
			Mary McCord				
LAWJ	455	01	Federal White Collar Crime	4.00	A-	14.68	
			Julie O'Sullivan				
Transcript Totals							
			EHrs QHrs QPts GPA				
Current			14.00 13.00 47.71 3.67				
Annual			28.00 27.00 102.06 3.78				
Cumulative			85.00 41.00 151.04 3.68				
End of Juris Doctor Record							

Molly Rosen
George Mason University School of Law
Cumulative GPA: 3.51

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts	Michael Krauss	B	4	
Property	Adam Mossoff	A-	4	
Contracts I	Daniel Pi	A	2	
Economics for Lawyers	Megan Stevenson	A	3	
Intro to Legal Research, Writing, and Analysis	Suzanne FtizGerald	A+	2	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legislation & Statutory Interpretation	Nelson Lund	A	2	
Civil Procedure	Chris Newman	B	4	
Contracts II	Daniel Pi	B+	3	
Trial-Level Writing	Suzanne FtizGerald	A	3	
Criminal Law	Craig Lerner	B-	3	

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 04, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to convey my highly enthusiastic recommendation of Molly Rosen for a clerkship in your chambers. In a word, Molly is a gem. She is an exceptionally gifted law student who is well on her way to being an outstanding lawyer; her intellectual capability, her gift for strategic thinking, and her bottomless and wide-ranging enthusiasm will make her a superb law clerk.

I had the enormous pleasure of getting to know and working intensively with Molly during the Fall 2020 semester, when she was a third-year student enrolled in the Georgetown University Law Center's Domestic Violence Clinic, which I have directed for almost 30 years. The Clinic is an intensive, semester-long course in which students represent indigent victims of domestic violence in emergency civil protection order litigation. Clinic students gain comprehensive experience in trial preparation and negotiation: they interview clients; draft complaints; conduct direct and cross examination; deliver opening statements and closing arguments; and engage in settlement negotiations and trial advocacy. In addition, students attend seminar classes that deal with a wide range of substantive family, criminal, and poverty law issues related to domestic violence and participate in numerous simulated litigation and lawyering strategy skill exercises. Because Clinic enrollment was limited to 12 students, I had an excellent opportunity to assess Molly's abilities.

Despite Molly's unassuming, modest demeanor, she is extraordinarily competent. She is a quick study, but she is always careful to slow herself down to make sure she has considered every angle of the legal problem confronting her. Unlike many of her peers, Molly is confident enough to welcome and absorb any and all critical feedback; she also has a gift for self-reflection and an enviable ability to critique her own work. At the same time, Molly is confident enough to never lose sight of her own opinion regarding the optimal path forward.

And Molly's lawyering work was superb. She created powerful direct examinations that told her client's story with drama and detail, while keeping a careful eye on efficiency. Similarly, she did outstanding work on drafting closing arguments, making them cogent and persuasive in terms of the law, the facts, and her client's credibility, and carefully anticipating potential counterarguments from the opposing party. Molly consistently engaged in the highest quality lawyering work while exhibiting a quiet sense of calm, regardless of the pressure of the moment.

Molly has the emotional intelligence of a far more experienced professional; she is able to quickly and successfully read other people, and she uses this skill to manage a wide range of difficult professional moments. As just one example, one of Molly's clients experienced severe trauma during her military service; her resulting mental health challenges made her easily frustrated and, as a result, a complicated person to represent. Molly dove into the challenge, constantly searching for the best ways to form a meaningful collaborative partnership and provide her client with zealous advocacy and meaningful support. She willingly took on the task of assisting her client beyond the requirements of the Clinic, working hard to help her sort through some complicated housing issues. By the end of the representation, the client told Molly that she felt so empowered by their work with her that she herself now hoped to launch a business to help domestic violence survivors navigate extra-legal hurdles.

In the Clinic seminar, Molly's contributions to every discussion were insightful and moved the conversation to a deeper place. She rapidly won the respect and trust of all of her Clinic colleagues. At the end of the semester, they gave Molly an award, the text of which I wholeheartedly agree with: "Molly is known for her boundless energy, upbeat attitude, and passionate, zealous advocacy. Her dedication to her clients goes beyond the case at hand; Molly understands that clients' needs often include extra-legal challenges, and she is deeply committed to working toward solving those challenges, inspiring her colleagues to do the same. She is admired for her organizational skills, her laser-like focus on her professional goals, her diligence, and her incredibly generous heart. Molly embraces a unique combination of bravery and humility, and will be remembered for her fierce advocacy on behalf of all of her clients."

Finally, I should note that Molly is an absolute pleasure to work with. She has a deep commitment to collegiality, a self-deprecating sense of humor, and a deeply generous soul. Molly's many talents will make her a significant asset to any judicial

Deborah Epstein - epstein@law.georgetown.edu - 2026629675

chambers fortunate enough to employ her. She has my highest recommendation.

If I can be of any further assistance, please do not hesitate to call.

Sincerely,

Professor Deborah Epstein
Co-Director,
Georgetown University Law Center
Domestic Violence Clinic

Deborah Epstein - epstein@law.georgetown.edu - 2026629675

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Molly Rosen for a judicial clerkship. I have had the pleasure of knowing Molly since she transferred to Georgetown Law at the start of her 2L year. In short order, Molly impressed me as a gifted and diligent student who is passionate about the study of law and the pursuit of justice. On top of this, she is simply an extremely nice person. I am confident that she will excel in a judicial clerkship, and I highly recommend her to you.

I taught Molly in the fall of 2019 in a course entitled The Persuasive Narrative. In the seminar, students learn about numerous storytelling tools (e.g., character and use of detail) and how they can be used to persuade. To put these tools to use, students complete three assignments: crafting the facts section of an appellate brief, writing an op-ed piece, and creating a visual presentation. My goal is not only to have students think about the power of story, but also to challenge them to use that power in genres that might feel unfamiliar.

Molly was a superstar in the course from the start. Underlying the course was a simulated problem: a criminal case against a journalist for violation of the Computer Fraud and Abuse Act. Molly had a particular interest in the law—she had done research related to the CFAA as an intern at the Department of Justice. As a result, she had great questions about the intricacies of the law and how it might apply to our scenario. Even in the past few months, long after the class finished, Molly has sent me emails when she has run across an important opinion or law review article involving the CFAA.

Beyond Molly's interest in the substantive law, she was equally invested in the more creative aspects of the course. Given that it was a one-credit course, I tried to curb my expectations about the amount of energy students would put into each of the three assignments. Molly shattered my expectations. Her work was polished, thoughtful, and demonstrated research far afield of what I expected. It was so obviously the product of intense time and revision. This was true even for the assignment that I thought would be most outside of law students' comfort zones—a PowerPoint presentation in which the students were in the role of a law firm pitching business to a client. Molly's presentation was visually sophisticated and powerful. I was incredibly impressed.

I was so impressed with Molly that I tried to convince her to apply to be a Law Fellow so that I could work with her again. Law Fellows are upper-class students who assist the faculty in teaching Legal Practice, Georgetown's 1L legal research, writing, and analysis course. Law Fellows draft the first round of comments on papers (which are then edited by faculty members), conference with students, and serve as mentors to the 1Ls. I knew Molly's commitment to excellence in her work, her diligence, and her great interpersonal skills made her ideally suited for the role. Molly was ready to apply but, as it turned out, she had a class conflict that prevented her from serving as the Law Fellow for my Legal Practice course. I still have not fully gotten over my disappointment!

To sum up, Molly would make a fabulous clerk. I enthusiastically recommend her to you, and I am happy to answer any questions that you may have.

Sincerely,

Erin Carroll

Erin Carroll - ecc66@law.georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 04, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I understand Molly Rosen has applied for a clerkship in your chambers. I was one of Molly's professors in law school and have gotten to know her quite well. I think very highly of Molly; she is a delightful person and an excellent writer with great energy and drive. I recommend her enthusiastically.

Molly took my "Cyber and National Security" seminar in the fall of 2020. She was a stand-out in the class and received an A. Molly was one of my most active participants and always had terrific insights on the material. Her final paper in the class was first-rate. The paper made a case for extraterritorial application of the Computer Fraud and Abuse Act. It is a complex topic and she wrote a substantively strong and persuasive paper. I truly enjoyed having Molly in the class.

What has impressed me most about Molly, in addition to her academic performance, is the energy and enthusiasm she brings to the legal topics we discuss. Perhaps more than any student I've taught. Molly has absorbed lessons from her legal jobs and her classes and is able to apply them in a new context. It gives her an unusually mature approach to legal issues – she thinks like a practicing attorney. This demonstrates not only her significant intellectual gifts, but a level of practical and emotional intelligence that I know will serve her very well as a lawyer – and in a judicial clerkship.

I know you would find Molly to be an exceptional law clerk and a joy to have in your chambers. Please let me know if I can provide any additional information.

Sincerely,

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Writing Sample

The following sample is a copy of my final paper for a course I took during the Fall 2021 semester, titled Cyber and National Security: Current Issues Seminar. The course focused on addressing legal and policy issues surrounding cybercrimes. The final paper assignment asked students to research and write about any legal issue relating to cyber and national security.

Molly Rosen

December 18, 2020

A Case for the Purely Extraterritorial Application of the Computer Fraud & Abuse Act

I. Introduction

On October 15, 2020, the Department of Justice (“DOJ”) charged six Russian GRU Officers for their worldwide deployment of destructive malware, computer intrusions, and computer attacks involving U.S. and non-U.S. victims.¹ The U.S. victims included the Heritage Valley Health System (hospitals and medical facilities in Pennsylvania), a FedEx Corporation subsidiary, and a large U.S. pharmaceutical manufacturer.² The non-U.S. victims included, French politicians and political parties, Ukrainian government services and critical infrastructure, the PyeongChang Winter Olympics infrastructure and personnel, and a Georgian media company.³ These charges targeted the GRU Officers not just for their actions against the U.S., but also for their actions around the world.

This indictment was not the first of its kind: in the past decade the United States has increasingly used similarly structured indictments to respond to and deter cyberattacks from abroad.⁴ But on what legal basis is the U.S. able to issue these indictments? Do traditional justifications for extraterritorial jurisdiction apply to a borderless cyberspace? These indictments raise an important question policymakers and prosecutors must answer: what statutory, constitutional, and international legal basis permit the United States to prosecute foreign cybercriminals for their actions abroad?

¹ Press Release, U.S. Dep’t of Justice, Six Russian GRU Officers Charged in Connection with Worldwide Deployment of Destructive Malware and Other Disruptive Actions in Cyberspace (Oct. 15, 2020), <https://www.justice.gov/opa/pr/six-russian-gru-officers-charged-connection-worldwide-deployment-destructive-malware-and> [hereinafter, DOJ October 2020 Press Release].

² *Id.*

³ *Id.*

⁴ See generally Garrett Hinck & Tim Maurer, *Persistent Enforcement: Criminal Charges as a Response to Nation-State Malicious Cyber Activity*, 10 J. NAT’L SEC. L. & POL’Y 525 (2019-2020).

Courts address extraterritorial questions through a three-step framework: (1) did Congress intend for a statute to apply extraterritorially, (2) does the United States Constitution (“the Constitution”) permit Congress to regulate extraterritorial conduct, and if so are there any limits on this power, and (3) does such regulation comport with principles of international law?⁵ This paper explores the answers to these questions in the cybercrime context.

First, it alleges that the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (“CFAA”), applies extraterritorially.⁶ The CFAA is the main statute that the DOJ uses to prosecute cybercriminals.⁷ The CFAA prohibits non-U.S. and U.S. perpetrators from (1) unauthorized access to “protected computers,” (2) conducting fraudulent schemes on “protected computers,” and (3) damaging “protected computers.”⁸ Under the CFAA, a “protected computer” is a computer

“used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.”⁹

As written, the CFAA governs three sub-categories of crimes: (1) foreign nationals who harm “protected computers” in the U.S. (“U.S. computers”), (2) U.S. nationals who harm “protected computers” outside of the U.S. that affect interstate or foreign commerce (“non-U.S. computers”), and (3) foreign nationals who harm non-U.S. computers. This paper will focus on the third category, the purely extraterritorial application of the CFAA, because it is the most controversial extension of

⁵ See generally *United States v. Reumayr*, 530 F. Supp. 2d 1210, 1214-15 (D.N.M. 2008); see also Margaret K. Lewis, *When Foreign is Criminal*, 55 VA. J. INT'L L. 625, 629 (2015) (“Applying domestic criminal laws beyond the confines of terra firma U.S. soil raises a number of questions, including whether Congress intended a law to have extraterritorial reach; if so, whether Congress has the constitutional power to so extend the law; and, if the law indeed applies off U.S. soil, what due process or other limitations are there on the people that can be caught in that law's net.”).

⁶ Computer Fraud Abuse Act, 18 U.S.C. § 1030 (2018).

⁷ For example, the DOJ alleged CFAA violations in the October 2020 indictment. See DOJ October 2020 Press Release.

⁸ 18 U.S.C. § 1030(a)(2), (a)(4), (a)(5), (a)(7), (e)(2) (sections 1030(a)(2), (a)(4), (a)(5), and (a)(7) all refer to harms done to “protected computers” (which is defined in section 1030(e)(2))). See Charles Doyle, Cong. Research Serv., RL 97-1025, *Cybercrime: An Overview of the Federal Computer Fraud and Abuse Statute and Related Federal Criminal Laws* 7 (2014) [hereinafter, “Doyle, CFAA overview”]. The CFAA also includes civil provisions but this paper only focuses on federal criminal applications of the statute, specifically the provisions dealing with a “protected computer” that affect interstate or foreign commerce.

⁹ 18 U.S.C. § 1030(e)(2)(B) (emphasis added).

U.S. law, and it highlights the challenge policymakers and prosecutors must face when applying traditional notions of extraterritoriality to cybercrime regulation and prosecution – that is, many cybercrimes are conducted abroad and can harm the U.S. without ever touching its “physical” borders.

Next, this paper explores constitutional support and challenges to purely extraterritorial regulation. It reviews textual support for Congress to regulate purely extraterritorial conduct and explains the limits prosecutors must face when prosecuting foreign actors for their conduct abroad.

Last, this paper reviews the international law principles that Congress must address when regulating purely extraterritorial conduct. Specifically, it analyzes the five international law principles that govern permissible prescriptive jurisdiction and argues that the U.S. should use the protective principle of international law to justify purely extraterritorial cybercrime regulation.

Ultimately, this paper seeks to provide an overview of considerations for parties seeking to either support or challenge the purely extraterritorial application of the CFAA. The goal is not to argue that purely extraterritorial regulation should be permissible, nor present the policy considerations of doing so. Instead, it explores the domestic and international legal boundaries of federal cybercrime regulation. Through a statutory, constitutional, and international law analysis, this paper will conclude that the stronger the nexus between the U.S. and a cyberattack, the stronger the case for purely extraterritorial regulation.

II. The Purely Extraterritorial Application of the CFAA

The extraterritorial inquiry begins with a statutory analysis – does the CFAA extend to purely extraterritorial conduct? The statute’s text and legislative history suggest it does. This section explores how courts typically answer extraterritorial questions and how courts have applied that answer to the CFAA’s three sub-categories of extraterritorial conduct.

A. The Presumption Against Extraterritoriality

In *RJR Nabisco, Inc. v. European Community*, the United States Supreme Court (“the Court”) laid the foundation for addressing questions of extraterritoriality.¹⁰ The 2016 decision set the precedent for the presumption against extraterritoriality:

“It is a basic premise of our legal system that, in general, ‘United States law governs domestically but does not rule the world.’ This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed Congressional intent to the contrary, federal laws will be construed to have only domestic application.”¹¹

Courts rebut the presumption under a “two-step” framework (“the RJR framework”).¹² First, courts must ask if the statute shows a “clear, affirmative indication” that Congress intended to regulate conduct abroad.¹³ The “clear, affirmative indication” test is not a plain statement rule: a statute does not need to say “this law applies abroad” for courts to apply it extraterritorially.¹⁴ But at the same time a statute’s reference to foreign commerce does not guarantee its extraterritorial application.¹⁵ Instead, the defendant’s conduct “must engage in, or affect in some significant way, commerce directly involving the United States.”¹⁶

If the statute “is not found [clearly] extraterritorial at step one, the Court moves to step two, where it examines the statute’s ‘focus’ to determine whether the case involves a domestic application

¹⁰ See generally *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016); see also Julie Rose O’Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021 (2018) [hereinafter, O’Sullivan] (providing a step-by-step roadmap for answering questions about extraterritorial criminal statutes, including a history and breakdown of federal jurisprudence on the topic).

¹¹ *RJR Nabisco*, 136 S. Ct. at 2100 (internal citations omitted).

¹² *Id.* at 2010.

¹³ *Id.* at 2093-94.

¹⁴ *Ryanair DAC v. Expedia Inc.*, No. C17-1789RSL, 2018 WL 3727599, at *2 (W.D. Wash. Aug. 6, 2018).

¹⁵ *RJR Nabisco*, 136 S. Ct. at 2105.

¹⁶ *Id.*

of the statute.”¹⁷ Since the CFAA satisfies the first step of the test, this paper does not discuss the second step in-depth.¹⁸

Applying the RJR framework, the CFAA applies extraterritorially because it explicitly states Congress’ intention to protect computers “located outside the United States.”¹⁹ As stated above, CFAA extraterritorial conduct can be broken down into three categories: the ability of Congress to regulate (1) a U.S. citizen who infiltrates a non-U.S. computer (that affects interstate or foreign commerce), (2) a non-U.S. citizen who infiltrates a U.S. computer, and (3) a non-U.S. citizen who infiltrates a non-U.S. computer (that affects interstate or foreign commerce). The following sections explain how courts have applied the RJR framework to each category.²⁰

B. U.S. Citizen → Non-U.S. Computers (that Affect Interstate or Foreign Commerce)

Applying the RJR test to the CFAA, the Western District of Washington, in *Ryanair DAC v. Expedia, Inc.*, concluded that the CFAA’s civil right of action applied extraterritorially.²¹ Plaintiff, Ryanair DAC (“Ryanair”) (an airline headquartered in Ireland), sued Defendant, Expedia (a commercial flight search engine, headquartered in the U.S.), for obtaining Ryanair’s flight information to use on Expedia’s website.²²

Ryanair claimed Expedia violated the CFAA because Expedia accessed Ryanair’s website, took information from it, and used the information for business purposes.²³ Such use was against a

¹⁷ *Id.* at 2093-94. The Court explained the second step as follows: “If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the relevant conduct occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of whether other conduct occurred in U.S. territory. In the event the statute is found to have clear extraterritorial effect at step one, then the statute’s scope turns on the limits Congress has or has not imposed on the statute’s foreign application, and not on the statute’s ‘focus.’” *See id.*; *see also United States v. Hutchins*, 361 F. Supp. 3d 779, 798 (E.D. Wis. 2019) (“In other words, if there is no clear Congressional intent for extraterritoriality, the Court must determine (1) the statute’s focus and (2) whether the conduct relevant to the focus occurred in the United States.”).

¹⁸ *See RJR Nabisco*, 136 S. Ct. at 2093-94; *see* Sections II.B. – II.D. below, explaining how the CFAA satisfies the first step.

¹⁹ 18 U.S.C. § 1030(c)(2)(B); *Ryanair*, 2018 WL 3727599, at *2.

²⁰ To date, no court has rejected the CFAA’s extraterritorial application in the criminal context.

²¹ *Ryanair*, 2018 WL 3727599, at *2. This section references a civil case because courts have yet to confront this sub-category of CFAA extraterritorial conduct in the criminal context.

²² *Id.* at *1.

²³ *Id.*

terms-of-use clause on Ryanair's website.²⁴ Expedia challenged Ryanair, claiming the CFAA did not apply extraterritorially.²⁵

The court disagreed: § 1030(e)(2)(B) was a "clear, affirmative indication" that Congress intended the CFAA to apply extraterritorially.²⁶ The court held:

"Other than prohibitions specific to government computers, nearly all the statute's protections guard against harm, damage, or unauthorized access to a protected computer.

'Protected computer' includes 'computer[s] located outside the United States.' That definition is as clear an indication as possible short of saying 'this law applies abroad.'"²⁷

Further, the court explained that the CFAA regulates unauthorized computer access, and such regulation requires novel notions of territory.²⁸ Unlike other criminal statutes, regulating computer access "happens simultaneously at the locations of the accessor and the accessed computer, with limitless possible locations that the transmitted data may pass through in between."²⁹ Since U.S. consumer data is now stored on servers around the globe, it "makes sense that the CFAA extends protection to computers outside the United States."³⁰

Thus, the court found that a non-U.S. citizen could hold a U.S. perpetrator liable for accessing its protected computer, even if the protected computer was not a U.S. owned computer and was located abroad.

C. Non-U.S. Citizen → U.S. Computers

In *United States v. Gaspirini*, the Eastern District of New York found, and the Second Circuit affirmed, that the CFAA applies extraterritorially when a non-U.S. perpetrator infiltrates U.S.

²⁴ *Id.* The definition of "unauthorized access" in the CFAA is currently before the Court in *Van Buren v. United States*. However, the outcome of *Van Buren* will not change this paper's extraterritorial analysis – this paper is about the location of the defendant and the location of his actions, not the nature of the actions themselves.

²⁵ *Id.* at *2.

²⁶ *Id.* (citations omitted).

²⁷ *Id.* (citations omitted) (emphasis added).

²⁸ *Id.* at *3.

²⁹ *Id.*

³⁰ *Id.*

computers.³¹ The Second Circuit confirmed the defendant's (an Italian national) conviction for developing and executing a malware that infected U.S. (amongst many other nations') computers.³²

The defendant had asked the District Court to dismiss the charge because the "ultimate aim of the alleged fraud targeted foreign companies and persons," and not U.S. citizens or U.S. computers.³³ However, the District Court dismissed the defendant's "ultimate aim," explaining that Congress passed the CFAA to protect U.S. citizens from unauthorized computer access, regardless of their status as either main victims or unintended victims.³⁴ Thus, the District Court (and later the Second Circuit) affirmed the extraterritorial application of the CFAA, and specifically held that the government could charge a non-U.S. citizen for directly infiltrating U.S. computers.

D. Purely Extraterritorial: Non-U.S. Citizen → Non-U.S. Computer (that Affects Interstate or Foreign Commerce)

In *United States v. Hutchins*, the Eastern District of Wisconsin permitted the government to charge a U.K. citizen under the CFAA (and other statutes) for the following conduct abroad: (1) developing malware and selling it to a third party who subsequently sold it to an individual in Wisconsin, and (2) hacking and analyzing a malware, publishing a blog post about the malware's vulnerability, and then updating and distributing the malware to a third-party located in California.³⁵ The defendant challenged the extraterritorial application of other statutes he was charged under, but not the CFAA, because in his words, "there is evidence that Congress intended [the CFAA's] extraterritorial application. The CFAA prohibits certain conduct with respect to 'protected

³¹ *United States v. Gasperini*, 729 Fed. Appx. 112, 114 (2d Cir. 2018) ("There is a strong argument that § 1030(a)(2) applies extraterritorially. A 1996 amendment to the statute defines a 'protected computer' to include any computer 'used in interstate or foreign commerce or communication.' [...] But we need not reach that argument here. The offense of which Gasperini was convicted requires no fraud victim, foreign or domestic. Rather, it prohibits unauthorized access to, and obtaining of information from, a computer. The jury had ample evidence to conclude beyond a reasonable doubt that Gasperini accessed, without authorization, nearly 2000 computers in the United State.").

³² *Id.*

³³ *United States v. Gasperini*, 16-CR-441 (NGG), 2017 WL 2399693, *6 (E.D.N.Y. June 1, 2017), *aff'd*, 729 Fed. Appx. 112, 114 (2d Cir. 2018).

³⁴ See *id.* at *6-10.

³⁵ *Hutchins*, 361 F. Supp. 3d at 784-85.

computers,’ and the legislative history shows that Congress crafted the definition of that term with foreign-based attackers in mind.”³⁶

As the defendant in *Hutchins* pointed out, the CFAA’s plain language and legislative history support its purely extraterritorial reach.³⁷ Originally enacted in 1986, Congress amended the CFAA in 1996 to expand the definition of “protected computers to include computers that affect interstate or foreign commerce or communication.”³⁸ When the Senate Judiciary Committee passed this amendment, it issued a report that explained its reasons for changing the statute.³⁹ In “that report, the Committee specifically noted its concern that the statute as it existed prior to the 1996 amendments did not cover ‘computers used in foreign communications or commerce, despite the fact that hackers are often foreign-based.’”⁴⁰ Congress then amended the CFAA again in 2001 to clarify that “protected computer” included a computer “located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.”⁴¹ This last amendment solidified the statute’s purely extraterritorial reach.⁴²

³⁶ Def.’s Mot. To Dismiss the First Superseding Indictment at 8, *United States v. Hutchins*, 361 F. Supp. 3d 779 (E.D. Wis. 2019) (No. 57) (quoting § 1030(e)(2)(B)) (referencing S. Rep. 104-357, at 4-5 (1996)). The court was the first court to confront purely extraterritorial cybercrime prosecution but did so in the context of rejecting the defendant’s due process claim (which is discussed in-depth in Section III.B. below). See *Hutchins*, 361 F. Supp. 3d at 799.

³⁷ See *supra* note 36; see also *United States v. Ivanov*, 175 F. Supp. 2d 367, 374 (D. Conn. 2001).

³⁸ Paul N. Stockton & Michele Golabek-Goldman, *Prosecuting Cyberterrorists: Applying Traditional Jurisdictional Frameworks to a Modern Threat*, 25 STAN. L. & POL’Y REV. 211, 228 (2014) (internal quotations and citations omitted) [hereinafter, Stockton].

³⁹ *Ivanov*, 175 F. Supp. 2d at 374 (quoting S. Rep. No. 357, 104th Congr., 2d Sess. (1996)).

⁴⁰ *Id.*

⁴¹ Doyle, CFAA Overview at 7 (quoting 18 U.S.C. § 1030(e)(2)(B)). Congress made this change in “Paragraph 814(d)(1) of the USA PATRIOT Act, P.L. 107-56, 115 Stat. 384 (2001).” *Id.* at 7, n.18. Congress passed the Patriot Act following the September 11th attacks in 2001. See Stockton at 228. Shortly after the attacks, “Congress rushed into action and quickly passed [this] antiterrorism legislation [...] [which] has been widely understood as a ‘sweeping’ antiterrorism law that gave the government ‘vast new powers’ to conduct electronic surveillance over the Internet.” Oren S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn’t*, 97 NW. U. L. REV. 607 (2003) (internal citations omitted). As a result of the speed in which Congress rushed to pass it, “little in the way of Committee reports or other legislative history exist [...] to help explain it.” *Id.* at 608. Accordingly, there is nothing to explicitly explain why Congress added this specific provision to the CFAA, but given the “sweeping” context in which it was passed, it can be assumed that it was intended to apply to purely extraterritorial conduct.

⁴² See Stockton at 228; see also Exec. Office for U.S. Attorneys, Prosecuting Computer Crimes 5 (2007), available at www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf (“In the USA PATRIOT Act, Congress amended the definition of ‘protected computer’ to make clear that this term includes computers outside of the United States so long as they affect ‘interstate or foreign commerce or communication of the United States.’ 18 U.S.C. § 1030(e)(2)(B) (2001). This change addresses situations where an attacker within the United States attacks a computer system located abroad and situations in which individuals in foreign countries route communications through the United States as they hack from one foreign country to another. Both situations can therefore be violations of section 1030.”).

Therefore, even if courts have not yet directly applied the RJR framework to the purely extraterritorial application of the CFAA, the category would likely pass the test, as evidenced by the statute's text, legislative history, and a defendant willing to admit to such. Further support for this interpretation stems from Congress' constitutional powers and the protective principle of international law.

III. Constitutional Considerations

The Constitution does not explicitly prevent Congress from regulating purely extraterritorial conduct, nor does it prohibit the Executive Branch from prosecuting such conduct.⁴³ Three Article I powers support Congress' ability to regulate purely extraterritorial behavior: (1) the Law of Nations and the Offenses Clause; (2) the Foreign Commerce Clause; and (3) the Necessary & Proper Clause.⁴⁴ Further, the Executive Branch can prosecute purely extraterritorial conduct so long as the non-U.S. defendants' constitutional rights are protected.⁴⁵

A. Congress' Power to Regulate Purely Extraterritorial Conduct

Congress' ability to regulate purely extraterritorial conduct is supported by three Article I powers.⁴⁶ First, the Constitution grants Congress the Power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."⁴⁷ This power is typically used to justify the extraterritorial application of laws in maritime context and is therefore not relevant for cybercrime legislation.⁴⁸

⁴³ See Charles Doyle, Cong. Research Serv., RL 94-166, Extraterritorial Application of American Criminal Law 1 (2016) [hereinafter, "Doyle, Extraterritorial Application of American Criminal Law"].

⁴⁴ *Id.*

⁴⁵ See *id.* at 5. This paper will not address the debate around extending constitutional protections to non-citizen defendants. For a discussion on that topic, see O'Sullivan at 1078-80.

⁴⁶ See Doyle, Extraterritorial Application of American Criminal Law at 1.

⁴⁷ U.S. CONST. art. I, § 8, cl. 10.

⁴⁸ See Doyle, Extraterritorial Application of American Criminal Law at 1.

Second, the Constitution grants Congress the power “[t]o regulate commerce with foreign Nations.”⁴⁹ However, the Court has not clarified the scope of Congress’ foreign commerce power and circuits vary on its scope.⁵⁰ Most circuits approach foreign commerce questions by applying the Court’s Interstate Commerce Clause precedents.⁵¹ This includes permitting Congress to regulate instrumentalities that affect foreign commerce.⁵² On this foundation, Congress’ amendment to the CFAA to include “non-U.S. computers that affect foreign commerce” is constitutional because the non-U.S. computers specified are “instruments” that affect foreign commerce.⁵³

Third, the Constitution grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁵⁴ Typically Congress uses this power to justify extraterritorial legislation enacted “in furtherance of the powers vested in one of the other branches or in reliance on powers it shares with one of the other branches [...] in the fields of foreign affairs and military activities.”⁵⁵ Justifications for purely extraterritorial regulation based on this provision would include the following argument:

⁴⁹ U.S. CONST. art. I, § 8, cl. 3.

⁵⁰ See Doyle, Extraterritorial Application of American Criminal Law at 3-4. In 2017, the Court denied a writ of certiorari challenging “a restitution award against a non-U.S. citizen based upon conduct that occurred in Australia.” *Batson v. U.S.*, 137 S.Ct. 850 (2017) (Thomas, J., dissenting). Justice Thomas dissented to the denial, and wrote an opinion urging the Court to take this case and clarify the boundaries of Congress’ foreign commerce power. *Id.* In the dissenting opinion Justice Thomas acknowledged that the Court “has never thoroughly explored the scope of the Foreign Commerce clause,” and as a result circuit courts often extend the power far beyond (what Justice Thomas believed) the framers intended it to reach. *Id.* at 850-52 (internal quotations omitted).

⁵¹ *Batson*, 137 S.Ct. at 851 (“In the absence of specific guidance, the courts of appeals [...] have understandably extended this Court’s Interstate Commerce Clause precedents abroad. In *United States v. Lopez*, [...] we held that Congress is limited to regulating three categories of interstate activity: the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce.” (internal quotations omitted)).

⁵² See *id.* at 851-52 (“Some courts of appeals have imported the *Lopez* categories directly into the foreign context, some have applied *Lopez* generally but recognized that Congress has greater power to regulate foreign commerce, and others have gone further still, holding that Congress has authority to legislate under the Foreign Commerce Clause when the text of a statute has a constitutionally tenable nexus with foreign commerce.” (internal quotations omitted)).

⁵³ 18 U.S.C. § 1030(e)(2)(B). What type of non-U.S. computers do and do not affect foreign commerce? As the Court in *RJR* stated, a statute’s reference to “foreign commerce” does not guarantee its extraterritorial application, but instead, the defendant’s conduct “must engage in, or affect in some significant way, commerce directly involving the United States.” *RJR Nabisco*, 136 S. Ct. at 2105. Courts have yet to define what this means in the cybercrime context, and their answers will likely depend on the facts of a specific case. But in practice, challenges to purely extraterritorial prosecutions typically arise in the form of challenges to due process, not to foreign commerce. Regardless, both challenges involve the same question – how connected is the defendant’s conduct to the U.S. such that purely extraterritorial regulation is permissible? This paper addresses the tests courts use to answer this question in Section III.B. below.

⁵⁴ U.S. CONST. art. I, § 8, cl. 18.

⁵⁵ Doyle, Extraterritorial Application of American Criminal Law at 4.

Congress' ability to regulate non-U.S. computers that affect interstate or foreign commerce is necessary to protect our nation from foreign-sponsored cybercrimes and cyberattacks.⁵⁶

Given the lack of explicit constitutional authority to regulate purely extraterritorial conduct, courts often make these decisions based on whether Congress intended the statute to apply extraterritorially (as opposed to whether Congress' statute applied extraterritorially, is unconstitutional legislation).⁵⁷ As explained in Section II, Congress wrote the CFAA to include purely extraterritorial conduct. But even when the statute is clear, a defendant's right to due process under the Fifth Amendment can limit purely extraterritorial regulation.⁵⁸

B. Constitutional Limits to Congress' Power to Regulate Purely Extraterritorial Conduct

Non-U.S. defendants facing prosecution for their conduct abroad typically raise Fifth Amendment due process concerns, arguing the prosecution is arbitrary and unfair.⁵⁹ Courts have typically found that prosecuting a non-U.S. defendant (for his conduct abroad that affects interstate or foreign commerce) is not arbitrary nor unfair when the government has shown a "sufficient nexus between the defendant and the United States."⁶⁰ What is a sufficient nexus? Courts vary in their responses.⁶¹

Some courts apply "a nexus test that serves the same purpose as the minimum contacts test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a

⁵⁶ See e.g., *United States v. Knowles*, 197 F. Supp. 3d 143, 160 (D.D.C. 2016) (holding the necessary and proper clause permits Congress to regulate drug trafficking entirely abroad because trafficking leads to significant harm U.S. citizens' health).

⁵⁷ See Doyle, Extraterritorial Application of American Criminal Law at 8-9.

⁵⁸ See *United States v. Yousef*, 327 F.3d 56, 58 (2d Cir. 2003); see also *United States v. Al Kassir*, 660 F.3d 108, 118 (2d Cir. 2011) ("When Congress so intends, we apply a statute extraterritorially as long as doing so does not violate due process.").

⁵⁹ See O'Sullivan at 1076; Doyle, Extraterritorial Application of American Criminal Law at 5 ("While the enumerated powers may carry specific limits which govern the extent to which the power may be exercised overseas, the general restrictions of the Fifth Amendment Due Process Clause have traditionally been mentioned as the most likely to define the outer reaches of the power to enact and enforce legislation with extraterritorial application.").

⁶⁰ O'Sullivan at 1076-77 (internal quotations omitted); see e.g., *United States v. Al Kassir*, 660 F.3d 108, 118 (2d Cir. 2011) ("To protect a defendant's Fifth Amendment due process rights, the government must show a 'sufficient nexus between the defendant and the United States, so that [the extraterritorial application] would not be arbitrary or fundamentally unfair.'").

⁶¹ See O'Sullivan at 1076-77. Here too the Court has not given a clear standard and circuit courts vary on what this right means for defendants prosecuted for their conduct abroad. *Id.* Some courts don't even apply a nexus requirement and just require that the extraterritorial prosecution is not arbitrary nor unfair. *Id.* at 1076, n.316 (referencing First and Eleventh Circuit decisions rejecting the nexus test).

defendant who should reasonably anticipate being hauled into court in this country.”⁶² Some take this a step further and argue a defendant needs to have reason to believe that his or her conduct will be subject to prosecution somewhere, but not necessarily in the United States.⁶³ Others “appear to look for real effects or consequences accruing in the United States before they find a nexus.”⁶⁴ And some take this farther and hold a sufficient nexus exists when the aim of the “activity is to cause harm inside the United States or to U.S. citizens or interests.”⁶⁵ Despite the lack of uniformity among circuits, one thing is clear: “due process expects that a defendant’s conduct must have some past, present, or anticipated locus or impact within the United States before he can fairly be held criminally liable for it in American court.”⁶⁶

Few courts have addressed the nexus question as it pertains to purely extraterritorial CFAA cases. In *Hutchins*, the Eastern District of Wisconsin (adopting the minimum contacts test) found the government alleged adequate nexus in the superseding indictment because the defendant “promoted his malware to individuals in the Eastern District of Wisconsin” and could therefore “reasonably foresee being hauled before [the] Court for trial on that issue.”⁶⁷ To further understand how courts have defined a “sufficient nexus,” parties can look at other areas of criminal law (terrorism, narcotics, etc.) and observe how courts have handled purely extraterritorial behavior in those contexts.⁶⁸ A review of those cases suggest that the stronger the defendant’s intent is to harm the

⁶² O’Sullivan at 1077 (internal quotations omitted) (emphasis added) (referencing two Ninth Circuit decisions).

⁶³ *Al Kassar*, 660 F.3d at 119 (“Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere. [...] [For example,] [s]upplying weapons illegally [...] to a known terrorist organization with the understanding that those weapons would be used to kill U.S. citizens and destroy U.S. property is self-evidently criminal; and their deliberate attempts to avoid detection suggested the defendants so understood.”).

⁶⁴ O’Sullivan at 1077 (emphasis added) (referencing Second and Ninth Circuit decisions).

⁶⁵ *Al Kassar*, 660 F.3d at 118 (emphasis added) (the Second Circuit also found that since the aim of the defendants’ activity was to harm the U.S., the government did not violate the defendants’ due process rights).

⁶⁶ Doyle, *Extraterritorial Application of American Criminal Law* at 7 (emphasis added).

⁶⁷ *Hutchins*, 361 F. Supp. 3d at 799.

⁶⁸ Terrorism and narcotics cases are probably the most helpful to compare cybercrime cases to because they often involve non-U.S. defendants acting abroad (as opposed to acting within U.S. territory). It is worth noting that many of the cases surrounding this debate involve the extraterritorial application of the wire-fraud statute. In these cases, the actors and intended victims are often all abroad, but the actors send the wires through U.S. financial institutions. *See, e.g., United States v. Elbaz*, 332 F. Supp. 3d 960 (D. Md. 2018) (permitting prosecution of an Israeli defendant—who intended to impact people around the world and in doing so harmed U.S. citizens—because the focus of the wire fraud statute includes misuses of the U.S. financial system to further a fraudulent scheme,

United States (i.e., the stronger the nexus), the weaker the Fifth Amendment due process defense is.⁶⁹

IV. International Law Considerations

Neither Congress nor courts are explicitly bound by international law principles, but both have a duty to enact and interpret domestic laws within the (U.S. recognized) international law principles' boundaries.⁷⁰ The U.S. recognizes five international law principles that govern "prescriptive (legislative) jurisdiction in criminal cases."⁷¹ Prescriptive jurisdiction refers to "a sovereign state's authority to criminalize a given conduct or [to] apply its laws to certain persons or things."⁷² That is, if the U.S. wants to extend its criminal statutes extraterritorially, it must first assert a basis under one of the following prescriptive principles: (1) nationality, (2) passive personality, (3) universality, (4) territoriality, and (5) protective.⁷³ This section explains the five principles and discusses which principles the U.S. could use to justify the purely extraterritorial application of the CFAA.

which is exactly what the prosecution charged the defendant for doing). It is difficult to compare these cases to the CFAA because unlike financial wires that actually touch U.S. banks, computer hacks into non-U.S. computers (that affect interstate or foreign commerce) can still harm the United States even if they do not touch a U.S. computer in the process (i.e., all of the conduct occurs entirely abroad).

⁶⁹ See e.g., *Yousef*, 327 F.3d 56 (finding a sufficient nexus existed to prosecute non-U.S. citizens for conspiring to hijack and bomb a U.S. aircraft in Asia, because the defendants intentionally acted to harm the U.S. and its citizens); *Al Kassir*, 660 F.3d 108 (affirming a sufficient nexus existed to prosecute non-U.S. citizens for supplying weapons to kill U.S. citizens); *United States v. Vasquez*, 899 F.3d 363 (5th Cir. 2018) (finding a sufficient nexus existed to prosecute foreigners (who operated totally outside of U.S. territory) for intending to distribute drugs into US markets).

⁷⁰ See generally O'Sullivan at 1029-30. When a "statute is ambiguous as to its extraterritorial application, lower federal courts generally apply two canons of construction," the presumption against extraterritoriality (as discussed in Section I.A. above), and the *Charming Betsy* canon. *Id.* at 1037-38. The latter instructs courts "when faced with congressional silence [...] [to] test the statute against the prescriptive principles of [international law] on the assumption that Congress did not mean to exceed them." *Id.* at 1038. Professor O'Sullivan argues the Court needs to explain the relationship between these two canons because at times, they can contradict each other. See *id.* at 1038-42.

⁷¹ O'Sullivan at 1029. These principles originated in a 1935 Harvard Law School study which divided the "circumstances under which the nations of the world had declared their criminal laws applicable," into five categories. Doyle, *Extraterritorial Application of American Criminal Law* at 12. In practice, these principles do not to limit the power of Congress, but instead "give other States a basis for objection if Congress" regulates behavior that exceeds the principles' boundaries. O'Sullivan at 1029-30.

⁷² Stockton at 216 (internal quotations omitted). For example, "[i]f a nation that experienced a cyberterrorist attack lacked prescriptive jurisdiction over cyberterrorist activity, that nation would be precluded under international law from subjecting the perpetrator to its judicial process." *Id.*

⁷³ *Id.*

The nationality principle gives a State prescriptive jurisdiction over its nationals outside as well as within the State's territory.⁷⁴ This principle does not support the purely extraterritorial application of the CFAA because by definition, purely extraterritorial involves prosecuting a non-citizen. Instead, this supports the conduct described in Section II.B. above.

The passive personality principle gives a State prescriptive jurisdiction when its citizens are victims of a crime.⁷⁵ Unlike the nationality principle, this could refer to purely extraterritorial conduct. However, this basis for jurisdiction is rarely used because it is controversial in the United States and more “commonly used in civil law countries.”⁷⁶ It is therefore not helpful for this inquiry.

The universality principle gives a State “jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern.”⁷⁷ States use this principle to justify jurisdiction over those who commit universally recognized heinous crimes abroad (like piracy, slave trade, genocide, war crimes, etc.) – even when the States' citizens aren't involved in the crime, “the State's nationals have not been victimized, and the State can claim no protective interests.”⁷⁸ While relevant in theory, this principle cannot practically support regulating purely extraterritorial cybercrimes because the provisions of the CFAA do not enumerate universally condemned crimes. For example, countries have fundamentally different views on whether unauthorized access (a CFAA provision) into another State's network is a crime worthy of

⁷⁴ O'Sullivan at 1034 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (AM. LAW INST. 1987) [hereinafter, Restatement Third]).

⁷⁵ O'Sullivan at 1034.

⁷⁶ *Id.*; see also *id.* at 1034, n.57 (“The Harvard Research Study asserted that this principle is the most difficult to justify in theory [...] To see why, consider a hypothetical case in which France attempts to prosecute an American who, while in the United States, engaged in an employment practice ‘victimizing’ a French employee, even if that labor practice was legal in the United States. Not only would this be seen as an intrusion on U.S. territorial sovereignty, but it would also raise questions of fair notice and legality: How is a U.S. citizen, acting in the United States, supposed to be on notice that his action may be subject to criminal prosecution in Paris?”).

⁷⁷ O'Sullivan at 1035 (quoting Restatement Third at § 404).

⁷⁸ O'Sullivan at 1035-36.

punishment.⁷⁹ Accordingly, the universality principle is only effective to the extent there are established diplomatic norms against the harms the CFAA enumerates.

The territorial principle gives States prescriptive jurisdiction over “crimes occurring or having an impact within” the States’ territory.⁸⁰ The *Restatement (Third) of Foreign Relations Law* lists two types of territorial jurisdiction: (1) subjective territorial jurisdiction (States can regulate “conduct that, wholly or in substantial part, takes place within its territory”), and (2) objective territorial (or effects) jurisdiction (States can regulate “conduct outside its territory that has or is intended to have substantial effect within its territory”).⁸¹ However, in 2010 the Court rejected the objective territorial justification because it was too “unpredictable and inconsistent” – now only the subjective inquiry is relevant.⁸² But, the subjective test does not help justify regulating cybercrime. The Internet, unlike physical territory, is borderless and traverses all nations simultaneously – “territory” has a different meaning in cyberspace.⁸³ If the U.S. were to use this principle, cybercriminals could significantly harm the U.S. but the U.S. would not be allowed to regulate the behavior because the cybercriminals did not act on U.S. soil.⁸⁴ Therefore, it should not be considered an option.

Last, the protective principle gives States prescriptive jurisdiction to regulate “certain conduct outside its territory by persons not its nationals that is directed against the security of the

⁷⁹ See Christian Ruhl et al., *Cyberspace and Geopolitics: Assessing Global Cybersecurity Norm Processes at Crossroads*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 26, 2020), <https://carnegieendowment.org/2020/02/26/cyberspace-and-geopolitics-assessing-global-cybersecurity-norm-processes-at-crossroads-pub-81110> (providing an overview and history of the cyber norm development process). In the cyber context, nations fundamentally disagree over “the applicability of international humanitarian law, the availability of the right of self-defense, and whether states could invoke the law of countermeasures to respond to cyberattacks.” *Id.*

⁸⁰ Doyle, *Extraterritorial Application of American Criminal Law* at 12.

⁸¹ O’Sullivan at 1030-32 (quoting *Restatement Third* at § 402(1)(a), (c)) (emphasis added).

⁸² O’Sullivan at 1034 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 257-58 (2010)). The fact that the next draft of the *Restatement (Fourth) of the Foreign Relations Law of the United States* no longer includes the objective test is additional evidence that the test is no longer relevant. *Id.* at 1034.

⁸³ Stockton at 231-32; see *id.* at 233 (“Although nations have been able to demarcate Internet activity to a certain extent by assigning Internet Protocol (‘IP’) and domain name addresses to computers that coincide with their physical addresses (such as a ‘.us’ domain name extension), cyberterrorists can easily evade this identification system. For example, even if a cyberterrorist’s computer is assigned to an Internet Protocol address in a certain country, the terrorist could simply transport the computer to another state without altering its domain name. Alternatively, cyberterrorists could connect to the Internet using virtual private networks and route through proxy servers in multiple countries to obscure their IP addresses. This would obfuscate their physical location and make it appear that their attacks were emanating from other countries.” (internal citations omitted)).

⁸⁴ One could argue that this is exactly why Congress extended the definition of “protected computer” in 1996 and 2001. See Section II.D. above.

State or against [...] other state interests.⁸⁵ That is, Congress can regulate a non-U.S. defendant's conduct so long as the conduct implicates "a security interest or governmental function of the United States."⁸⁶ U.S. courts have used this principle to justify jurisdiction over cases involving drug trafficking, immigration, terrorism, and counterfeiting.⁸⁷

The protective principle most appropriately supports regulating purely extraterritorial cybercrimes.⁸⁸ Not only do cybercrimes sufficiently threaten national security and stability, but also they can jeopardize public safety and the nation's economy.⁸⁹ Unlike the other principles that either focus on irrelevant territorial boundaries or non-existent universal norms, this principle permits the purely extraterritorial regulation of the CFAA so long as the cybercrime implicates a U.S. security interest or government function. Under this principle it doesn't matter *how* the attack manifested: through a non-U.S. computer that affects interstate or foreign commerce or through a U.S. computer directly. The protective principle allows courts to shift the attention away from *where* the conduct occurs (a question increasingly less relevant as technology advances) and instead focus on the direct relationship (or nexus) the conduct has to harming the United States.

V. Conclusion

Statutory, constitutional, and international law inquiries into the purely extraterritorial application of the CFAA all point to the same question: how connected is the non-U.S. computer to the U.S.? Statutory inquiries ask this question to ensure compliance with the RJR framework.

⁸⁵ O'Sullivan at 1035 (quoting Restatement Third at § 402(3)) (emphasis added).

⁸⁶ *Reumayr*, 530 F. Supp. 2d at 1222. For example, in *United States v. Reumayr*, the defendant, a foreign national, was charged with disrupting oil supply—acting entirely on foreign soil—to the United States, because the disruption was intended to "destroy a domestic energy facility," and in turn the "U.S. financial markets." *Id.* Even though the conduct occurred entirely abroad, the court denied the defendant's motion to dismiss the indictment because such conduct implicated "a security interest of the United States and [was] thus cognizable with the protective principle of international jurisdiction." *Id.*

⁸⁷ Stockton at 217. Professor O'Sullivan argues the government should stop using the protective principle to justify drug trafficking because drug trafficking does not "directly threaten the security of the State or the integrity of its functions." O'Sullivan at 1035.

⁸⁸ See Stockton at 217 ("This Article argues that [...] the United States should justify the extension of extraterritoriality by using the protective principle of prescriptive jurisdiction for cyberterrorist attacks.").

⁸⁹ See *id.*

Constitutional inquiries ask this question to ensure Congress is appropriately exercising its foreign commerce power and not violating a defendant's Fifth Amendment due process rights in the process. And international law inquiries ask this question to ensure the U.S. is following the boundaries of at least one of the prescriptive jurisdiction principles. All of these inquiries lead to a common answer: the more "involved" the U.S. is as a victim of the cyberattack, the stronger the case for purely extraterritorial regulation.

In a world where indictments are increasingly being used as a non-violent deterrence method, policymakers and prosecutors are searching for legal (domestic and foreign) justifications to support them. Accordingly, this paper presents the relevant statutory, constitutional, and international law considerations parties will encounter when applying the CFAA to purely extraterritorial conduct.

Applicant Details

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 JD/LLB From **Fordham University School of Law**
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Bar Admission

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Rebecca Rosen
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The Honorable Elizabeth W. Hanes
United States Magistrate Judge
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr.
United States Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes,

I am a May 2018 graduate of Fordham University School of Law, where I was a member of the Urban Law Journal and received the Archibald R. Murray Public Service Award for my work in the Legislative and Policy Advocacy Clinic. Presently, I am an associate at Schenck, Price, Smith & King, LLP. I am respectfully applying for a clerkship with your chambers for the 2021-2023 court terms, or any term thereafter. It is my intention to relocate to Virginia, and the opportunity to clerk would be an invaluable chance to serve the legal community.

As an associate at Schenck Price I construct pleadings and briefs on various subjects relating to commercial litigation disputes. My duties include conducting legal research, drafting motions, answering and serving discovery requests, drafting settlement agreements, and managing case files. Prior to my current employment I worked as a student advocate in the Legislative and Policy Advocacy Clinic. There, I spent two semesters advocating on behalf of the Osborne Association to change hearts and minds on issues related to the incarceration of parents. I also gained legal experience during my first-year summer as an intern for Judge Contillo in the New Jersey Superior Court Chancery Division in Bergen County, where I reviewed and analyzed party submissions and conducted legal research in matters where equitable relief was sought, in order to make recommendations to the judge.

Please find my resume, transcript, writing sample, and letters of recommendation from John M. Bowens (973-540-7357) and Michael K. Mullen (973-540-7307), uploaded to my online application. Thank you for your kind consideration of my application.

Very truly yours,

/s/Rebecca Rosen
Rebecca Rosen

REBECCA J. ROSEN

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ADMISSIONS

New Jersey, August 2019
New York, July 2020
U.S. District Court, District of New Jersey, October 2019

LEGAL WORK EXPERIENCE

Schenck, Price, Smith & King

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Summer Associate

Florham Park, N.J.
September 2018 – Present
Summer 2017

Draft pleadings and briefs on subjects such as the scope of discovery, jurisdiction, statute of limitations, service of process, formation of contract, public notice under the New Jersey Open Public Meetings Act, zoning, the New Jersey Consumer Fraud Act, wrongful discharge, the requirements for obtaining injunctive relief, and attorneys' fees. Draft motions and supporting documents, including motions for: default, summary judgment, judgment on the pleadings, injunctive relief, to seal, to amend, to remand, to correct metadata, to access real property, in aid of litigant's rights, for sanctions, and discovery motions. Draft discovery requests and responses. Draft settlement agreements. Conduct legal research and draft memoranda for attorneys and clients on a variety of topics. Manage case files. Communicate with clients concerning the status of their case and prep them for court appearances and depositions. Attend court appearances, depositions, and mediation and settlement conferences.

Hon. Robert P. Contillo, Superior Court of N.J., Bergen County, Chancery Division

Judicial Intern

Hackensack, N.J.
Summer 2016

Reviewed party submissions, conducted legal research, and wrote draft opinions and orders in matters such as business disputes where equitable relief was sought, domestic disputes including over custody and property, and disputes over guardianship, wills, and land. Made recommendations to the judge. Attended courtroom proceedings.

The Legal Aid Society

Paralegal - Criminal Appeals Bureau

New York, N.Y.
June 2012 – August 2015

Launched the Appeals Project, a program to increase participation in the appellate process. Recognized by the President and Vice President for creation of a productivity report. Designed a screening process to identify cases ripe for appeal. Trained paralegals. Collaborated with 150 trial attorneys. Filed Notice of Appeal applications. Communicated directly with a diverse client base, including Spanish speakers, hearing impaired, and mentally ill.

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Fordham University School of Law

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Honors: Merit scholarship, Fordham Urban Law Journal, Legislative & Policy Advocacy Clinic, Archibald R. Murray Public Service Award 2018

New York, N.Y.

Smith College

B.A. in Sociology with a minor concentration in Spanish, May 2012, G.P.A. 3.52

Honors: Dean's List 2009-2012, Research Grant 2011, First Group Scholar 2012 (*Grades in top 5% of class*), Best Sociology Paper 2012

Honors Thesis: *Visualizing Racial Identity*, Selected to present research findings at the Eastern Sociological Society's National Conference (NYC, February 2012)

Activities: Varsity Swim Team 2008-2012 (Varsity Swim Team Captain 2011-2012)

Northampton, M.A.

MEMBERSHIPS & INTERESTS

Justice Morris Pashman Inn of Court (*Anticipated Induction January 2021*); American Bar Association; Crossfit (*Participate regularly in competitions*), Olympic weightlifting, International travel

Rebecca Rosen
Fordham University School of Law
Cumulative GPA: 3.395

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Process and Quantitative Method	Nicholas W. Haddad	P	.000	
Legal Writing and Research	Nicholas W. Haddad	IP	.000	
Criminal Law	John Pfaff	B	9.00	
Property	Carl Minzer	B+	16.6	
Civil Procedure	Howard M. Erichson	A-	14.6	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Aditi Bagchi	B+	13.3	
Legislation and Regulation	Ethan J. Leib	B	12.0	
Torts	Jed E. Shugerman	A	16.0	
Constitutional Law	Corey Brettschneider	B	12.0	
Legal Writing and Research	Nicholas W. Haddad	B	9.00	

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Torts	James C. Francis	B	6.00	
Introduction to Health Law	Kimani Paul-Emile	A-	11.0	
Fundamental Lawyering Skills	Leonard Noisette	A-	11.0	
Corporations	Roger Goebel	B-	10.6	

Spring 2017

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Legislative and Policy Advocacy Clinic Coursework	Elizabeth Cooper	A-	11.0	
Children and Immigration Law	Olga Byrne	A-	7.33	
Complex Litigation	Howard M. Erichson	A-	11.0	
Biotech Patents and Regulations	Jolene Appleman	A-	7.33	
Legislative & Policy Advocacy Clinic Seminar	Elizabeth Cooper	A-	7.33	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
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Independent Study	Kimani Paul-Emile	CR	.000
Federal Courts	Andrew Kent	A-	11.0
Legislative and Policy Advocacy Clinic Coursework	Elizabeth Cooper	A-	11.0
Writing Requirement	Kimani Paul-Emile	S	.000
Legislative and Policy Advocacy Clinic Seminar	Elizabeth Cooper	A-	3.66
Law and Biomedical Ethics	Kimani Paul-Emile	A-	11.0
Professional Responsibility	Andrew Kent	B+	9.99

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Medical Malpractice Litigation	Adam Shlahet	B+	9.99	
National Security Law	Andrew Kent	B+	9.99	
Evidence	James Kainen	B	12.0	
Trial and Arbitration Advocacy	Kenneth Montgomery	A-	11.0	

August 22, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Please accept this letter of recommendation on behalf of the candidacy of Rebecca J. Rosen, Esq. It is our understanding that Ms. Rosen is currently applying for a clerkship position within the Federal Court System.

I have known Rebecca for nearly three years. I am one of my law firm's senior partners and I have had occasion to work with Rebecca both as a summer associate and as an associate. Rebecca has largely worked within our law firm's Litigation Department as an associate although she has recently begun to assist members of the firm's Corporate Law Department in some matters.

I have done a significant amount of work with Rebecca during her tenure at the firm. In particular, I have had occasion to do a great deal of work with her over the course of the last 14 months. I have occasion to see or speak with Rebecca almost every day, even during this bizarre COVID-19 period.

I strongly recommend Rebecca for the clerkships that she seeks. Rebecca is a terrific person who is quite personable and curious. She is bright and is very, very hard-working. The best example of her willingness to work hard arises from the recent COVID-19 experience in that in addition to holding down a regular workload, Rebecca is one of the attorneys at the firm who is composing COVID-19 legal updates seemingly on a daily basis.

Rebecca is certainly not afraid of hard work and she certainly is not afraid to ask questions. She is committed to the notion of improving herself each and every day. She does so with a smile and a ton of good humor. She has an inquisitive mind.

In addition to "regular" litigation that Rebecca has handled, she also had her fair share of constitutional law work. She has enjoyed that work very much and has succeeded in helping the firm secure good results in the context of such work.

It goes without saying that Rebecca's personable nature is such that she gets along with others both in terms of other attorneys and staff.

In many ways, there is a competitiveness and fearlessness about Rebecca which is in no way exaggerated or reckless. Part of this stems from her athletic nature and part of this stems from her very, very determined work ethic.

Rebecca has made a very positive contribution to our firm beyond her substantive work. She has taken an active role in many of the firm's charitable endeavors and has assisted many of the firm's partners with respect to their own charitable involvements or commitments.

Should you have any questions regarding Rebecca, please feel free to contact me at any time. My direct dial telephone number is 973-540-7307. Additionally, you are free to contact me by way of my cell phone at any time. My cell number is 973-540-7307. Finally, I am constantly on email so please feel free to email me at any time. My email address is mkm@spsk.com.

Thank you in advance for your active consideration of Rebecca. She will not disappoint you! I trust that you and your family will stay safe and stay strong during the difficult time.

Very truly yours,

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August 22, 2020

The Honorable Elizabeth Hanes
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Dear Judge Hanes:

Rebecca Rosen started with our firm approximately two (2) years ago, before she was admitted to the bar. We immediately provided her with briefing assignments. Her work was outstanding, particularly for someone so new to the law.

She has drafted multiple briefs including on matters of first impression in New Jersey. She took a leading hand in the matter of Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation et al., a case which resulted in opinions in both the New Jersey and United States' Supreme Courts.

Rebecca's work has been uniformly outstanding and as a first-year associate, it is even more noteworthy. From a personal perspective, I have never experienced an associate of such limited experience draft such comprehensive and cogent briefs. Had Rebecca been admitted to the bar, her name would have appeared prominently on a number of briefs, including those in the Freedom from Religion case.

Very truly yours,

John M. Bowens

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WRITING SAMPLE

The attached sample is a brief in opposition to the defendants' motion to dismiss for lack of subject matter jurisdiction which was submitted to the United States District Court in the District of New Jersey. The brief is my original work and only includes minor edits from my supervising partner on this matter, John M. Bowens, Esq. It is being submitted with the express approval of Schenck, Price, Smith & King, LLP.

Background

In the initial case involving this dispute, plaintiffs sued a County Board of Freeholders and related defendants (the "County") in the Superior Court of Morris County, Chancery Division under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c), seeking a declaratory judgment that certain historical preservation grants violated the New Jersey Constitution. Plaintiffs also sought a permanent injunction to prevent any further grants from being issued, as well as attorneys' fees and costs. This case was appealed to the New Jersey Supreme Court where plaintiffs prevailed. Subsequently, the United States Supreme Court denied the petition for certiorari.

Thereafter, plaintiffs filed a motion in the Superior Court seeking to reopen the original complaint and for attorneys' fees. The County filed an order to show cause and for temporary restraints in the United States District Court in the District of New Jersey, seeking to enjoin plaintiffs' motion. In response, plaintiffs (in the federal action here, defendants) filed a motion to dismiss for lack of subject matter jurisdiction and we (the County) filed this brief in opposition.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants, *X* and *Y* (“Defendants”), erroneously urge this Court to accept the proposition that the County should not be allowed relief from the New Jersey District Court because it already litigated a lawsuit with the Defendants in state court. In pursuing this argument, the Defendants evade salient facts and law that fully support the determination that the Court has subject matter jurisdiction and the County has articulated a cause of action under multiple federal statutes.

Restated a dozen ways, Defendants allege that the County is asking this Court to review the same claims litigated in the state court, but the facts do not support the Defendants’ motion. They simply ignore that the current claim addresses the County’s federal rights not to be penalized for engaging in conduct consistent with the United States Constitution. The former lawsuit dealt with whether a voter-approved Grant Program which permitted grants to religious institutions could be upheld under the New Jersey Constitution. There is no dispute here about the Grant Program and no challenge to the New Jersey Constitution. The only issue is whether the County can be penalized for engaging in Constitutional conduct.

Defendants argue that the County has not stated a federal cause of action based upon nothing more than their self-serving conclusions. Meanwhile, the law provides that civil liability does exist for violations of the County’s constitutional rights. The archetypical case in which a municipal entity may be able to hold a private actor liable is when it engages in a course of conduct which has a very public effect and implication. While arguably certain defendants do not meet this standard, the evidence of conduct by Defendants renders the notion of “private action” in their case meaningless.

While perhaps notable for their protracted and premature claim, Defendants' arguments lack both legal and factual support. Accordingly, the County's order to show cause should be granted, and Defendants' motion should be denied.

STATEMENT OF FACTS

The County relies upon the Verified Complaint for the facts relevant to this action.

LEGAL ARGUMENT

POINT I

SUBJECT MATTER JURISDICTION JURISPRUDENCE REQUIRES THE FINDING THAT THE COUNTY HAS ASSERTED JURISDICTION UNDER 28 U.S.C. § 1331.

A. The County asserted subject matter jurisdiction.

Defendants' claim that the County fails to assert jurisdiction under 28 U.S.C. § 1331 is based upon their selective reading of the Order to Show Cause. Initially, Defendants simply ignore the standard that applies under Fed. R. Civ. P. 8(a)(1), that the complaint must contain only "a short and plain statement of the grounds for the court's jurisdiction." In making that determination a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [Plaintiff]." Phillips v. Cty. of Allegheny, 515 F.3d 224, 228 (3d Cir. 2008). Further, the Complaint sets forth, in detail, the substance of the County's claims and meets the pleading requirements set forth in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The County has alleged that the imposition of exorbitant attorneys' fees, on the basis that it has given grants to Churches under a valid, voter-approved Grant Program will cause immediate and irreparable harm. Fed. R. Civ. P. 8(a)(1) does not warrant, let alone require, that the County go beyond this plain language in asserting its claim for relief.

B. The Rooker-Feldman doctrine provides support for the County's claim.

Defendants attempt to shoe-horn the County's claim into the prohibitions of the Rooker-Feldman Doctrine, by contorting its plain language beyond anything the courts could have intended. The Rooker-Feldman Doctrine states that in select circumstances a District Court is deprived of jurisdiction to review a state court adjudication. Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). In Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005), the United States Supreme Court emphasized the narrow scope of that doctrine, holding that Rooker-Feldman "is confined to cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."

Were the County to seek to overturn the original judgment or to challenge the constitutionality of the Grant Program, the Rooker-Feldman Doctrine might well prohibit such an action. Here, however, rather than seeking the resuscitation of the Grant program, the County simply seeks to avoid the imposition of a penalty for implementing a program fully compliant with the United States Constitution. Indeed, the court in Exxon Mobil observed:

[N]either Rooker nor Feldman supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches the judgment on the same or related question while the case remains sub judice in a federal court . . . If a federal plaintiff present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.

[Id. at 292.]

The purpose of the Rooker-Feldman Doctrine is to prevent appeals from state court judgments. Nothing in the County's claim runs contrary to that purpose.

The Rooker-Feldman Doctrine did not intend to police the adjudication of federal claims that seek relief from independent injuries. Indeed, critical to the application of the Rooker-Feldman Doctrine is that the injuries complained of are distinct from the state-court judgment. In Carroll v. Rochford, 123 Fed. App'x 456, 459 (3d Cir. 2005), where the plaintiff "never raised his First Amendment claim either in the administrative or state proceedings, and the issue was never adjudicated" the court found that the federal action was not "inextricably intertwined". The court similarly could not reject a claim where the injuries complained of in the prior litigation, which centered on an attempt to win reinstatement and back pay, were different from the federal litigation seeking damages based on a violation of First Amendment rights. Id.

In Ernst v. Child & Youth Serv., 108 F.3d 486 (3d Cir. 1997), the Court considered the petition of a grandmother who alleged pursuant to 42 U.S.C. § 1983 that she was deprived of custody of her granddaughter through the actions of child welfare workers and the cross-appellant attorney. In deciding that the Rooker-Feldman Doctrine did not preclude the district court from deciding the grandmother's claims for damages the Court stated that it "would not have required the court to find that the state court judgments . . . were erroneous." Id. at 492. See also Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) (holding that the court "was not barred under Rooker-Feldman from hearing the constitutional and fraud claims of Marks . . . because these claims had not been determined by the state court, nor were they inextricably intertwined with a prior state court decision") (citing Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989)); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987); Bonner v. Montgomery Cty., No. 10-2055, 2011 U.S. Dist. LEXIS 32961, at *10, n.3 (E.D. Pa. Mar. 28, 2011) (holding that where the federal complaint "asks us to

review the constitutionality” of a state court decision, the claim was not barred by Rooker-Feldman).

Federal subject matter jurisdiction is supported by Rooker-Feldman because the County complains of a distinct cause of injury. In Rose v. City of Allentown, 211 Fed. App’x 133, 138 (3d Cir. 2007), the court found that a federal complaint with overlapping issues can be heard. The court’s decision hinged on its view that the injuries complained of preceded the state court judgment. The court noted, “Rose’s first federal complaint overlaps with his adjudicated state-court claims . . . however, ‘this overlap does not mean that the Rooker-Feldman doctrine is applicable.” Id. at 138. See also Hill v. Barnacle, 598 Fed. App’x 55, 57 (3d Cir. 2015), where the court distinguished the federal action, finding that following the dismissal of her state court petition claiming that a visitation ban violated her due process rights she could pursue a federal Section 1983 complaint based on the same conduct.

The County’s present injuries are distinguishable from the state action. While there is some overlap between the present order to show cause and the state proceedings, this expected overlap does not bar federal subject matter jurisdiction. The injuries asserted here are not caused by the original state judgment but by the pending action for attorneys’ fees. The pending request for attorney’s fees causes additional harm which has not been considered. Plainly, the County has demonstrated a distinct cause of action which does not offend Rooker-Feldman in any way.

C. The County has federal question jurisdiction.

Federal question jurisdiction under 42 U.S.C. § 1983 is not barred to a county raising a claim against a private actor. While the County is constrained to agree with Defendants that Section 1983 excludes “merely private conduct”, Blum v. Yaretsky, 457 U.S. 991, 1002 (1982), liability under Section 1983 may attach to a private actor if the challenged conduct is “fairly

attributable to the [S]tate.” Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982). Whether an action may be fairly attributable to the State “is a matter of normative judgment, and the criteria lack rigid simplicity.” Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288 (2001). Indeed, the Supreme Court has adopted a flexible, “fact-specific” approach to determining whether state action exists. Groman v. Twp. of Manalapan, 47 F.3d 628, 638 (3d Cir. 1995). Plaintiffs rely upon their mantra that they should receive a dismissal simply because they say so. While the County does not dispute that Defendants are private actors, their goal is to have the State Court punish the County for engaging in Constitutionally protected conduct.

D. The County’s injury has been clearly articulated to support standing.

In ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987), the court assessed the evidence a party must produce to demonstrate an injury to support standing in the case of a preliminary injunction, finding that it must be “sufficient to convince the court that . . . the movant will be irreparably injured by denial of relief.” What is “irreparable . . . varies from case to case and there are no set guidelines in terms of financial harm, delay, or damage to personal rights that can be carried from one case and applied in another.” McCormick v. Hirsch, 460 F. Supp. 1337, 1349 (M.D. Pa. 1978).

Though there are no set guidelines for what constitutes irreparable harm, there are some general rules that help to define what is irreparable, one of which is, “[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” Id. In the seminal case of Elrod v. Burns, 427 U.S. 347, 373-74 (1976), the Supreme Court found that, in the context of certain constitutional injuries no harm other than the constitutional violation need be plead to demonstrate irreparable harm for purpose of a preliminary injunction. In Burns, the court observed, “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Id. at 374. Importantly, the County

cannot seek relief in the state courts because of the prior adjudications, such that this Court is the only avenue for relief. Consequently, it cannot be denied that the facts presented by the County establish that irreparable harm will ensue if this Court dismisses its claim.

The Defendants justify the \$750,000 penalty by offering the counterintuitive proposition that: “[Defendants’] actions have actually saved the County millions of dollars.” Defendants’ Brief at 9. Defendants’ argument confuses monies which the citizens of the County earmarked for civic purposes with the payment of a constitutionally repugnant tax on the County for acting in conformity with the constitution. Defendants effectively mischaracterize the underpinning of the County’s claim. As in Burns, 427 U.S. at 374, where municipal employees were threatened to be discharged and deprived of financial benefit on the basis of their political views, the County is threatened a deprivation of its finances in direct contravention of its Constitutional rights.

Third Circuit precedent affirms the finding that a threatened constitutional violation constitutes immediate and irreparable harm for purposes of attaining a preliminary injunction. Hohe v. Casey, 868 F.2d 69, 73 (3d Cir. 1989) (“[i]t is well-established that ‘the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury’” (citing Burns, 427 U.S. at 373)). In the context of a preliminary injunction, courts have found it particularly important to protect against threats to religious freedom and association. In fact, in Pub. Funds for Pub. Sch. v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), the court found that the threatened deprivation of rights guaranteed by the establishment and free exercise clauses of the First Amendment is per se irreparable harm for purposes of granting a preliminary injunction.

Likewise, in McCormick v. Hirsch, 460 F. Supp. 1337, 1349 (Pa. M. D. 1978), the court found that “the beginnings of entanglement and restraint of free exercise rights would start

immediately on the institution of the certification proceeding.” There, the court found the Defendant’s assertion that “mere litigation expense . . . does not constitute irreparable injury” to be unavailing, observing that the plaintiff properly contended, “the harm is not the expense of submitting to a proceeding, but the unconstitutionality of the proceeding itself.” *Id.*

Defendants’ statement that the County has no injury is simply not true. Irreparable harm would immediately flow from the continuance of a proceeding to penalize the County on the basis of its association with religious organizations.

POINT II

THE COUNTY HAS STATED A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

A. Collateral estoppel does not preclude the County where it has asserted an independent cause of action.

To establish that collateral estoppel forecloses litigation of an issue, the party asserting this bar must show that (1) the issue to be precluded is identical to the issue decided by the prior proceeding; (2) the issue was actually litigated in that proceeding; (3) the court there issued a final judgment on the merits; and (4) the determination of the issue was essential to the prior judgment. *Fitzgerald v. Shore Mem’l Hosp.*, 92 F. Supp. 3d 214, 225-26 (D.N.J. 2015) (citing *Seborowski v. Pittsburgh Press Co.*, 188 F.3d 163, 169 (3d Cir. 1999)).

Initially, Defendants must prove that the issue asserted in the present action is the same. While they repeatedly incant unsupported allegations that the County’s present case is premised on the state court’s finding concerning the constitutionality of the Grant Program, the Order to Show Cause provides no support for this contention. The issue at hand in this case is whether the penalization of the County based on its prior association with religious institutions is supported by the federal constitution—an issue that is not identical; has not been litigated; for

which there has not been any judgment issued; and, which was not even a part of the prior judgment, let alone essential to it.

B. The County's 1983 claim is proper.

The County is entitled to bring its Section 1983 claim, regardless of Defendants' status as private actors. The Supreme Court has explained:

[T]o maintain a cause of action under Section 1983, a plaintiff must demonstrate: (1) the conduct complained of was committed by persons acting under color of state law; and (2) the conduct violated a right, privilege, or immunity secured by the Constitution or laws of the United States.

[West v. Atkins, 487 U.S. 42, 48 (1988).]

The “under color of state law” requirement excludes only “merely private conduct.” Blum, 457 U.S. at 1002. However, liability under Section 1983 may attach to a private actor if the conduct is “fairly attributable to the [S]tate.” Lugar, 457 U.S. at 937. Under this standard, an action may be considered fairly attributable as “a matter of normative judgment, and the criteria lack rigid simplicity” such that the inquiry is “fact-specific.” Brentwood Academy, 531 U.S. at 295; Groman, 47 F.3d at 638. When facts are in dispute, the court should decide whether the plaintiff can establish that the private actor was acting under color of state law. Groman, 47 F.3d at 638.

In the analysis of whether a claim can be stated under Section 1983, the plaintiff must show that the defendant was acting “under color of any statute” of the state. Lugar, 457 U.S. at 930 (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978)). The Court has recognized that state action exists when purely private litigation resulted in a state court judgment that was subject to immediate enforcement by the state. Shelley v. Kraemer, 334 U.S. 1, 13-14 (1948) (holding that state enforcement of a private discriminatory contract violated the Fourteenth Amendment); N.Y.

Times v. Sullivan, 376 U.S. 254, 265 (1964) (finding the exercise of state power in the private application by Alabama state rule of law that allegedly violated constitutional freedoms of speech and press). Courts have found it to be particularly availing that a private actor is acting under color of state law once a state court has “placed its weight behind a position adverse to the federal plaintiff’s federal right” in the form of an enforceable state court judgment. Gresham Park Cmty. Org. v. Howell, 652 F.2d 1227, 1229 (5th Cir. 1981).

Here, Defendants have done nothing from which a court could conclude that their actions are “merely private conduct” and excluded from review by federal courts. Defendants do no more than conclude that they are not state actors. They do not even reach the legal hurdles erected by the Supreme Court, let alone clear them. Meanwhile, they have acted under the guise of state law to obtain a judgment immediately enforceable by the state that violates the First Amendment. Accordingly, the County is entitled to pursue its Section 1983 claim.

The finding that a county or municipality is intended to be considered as persons under the statute is derived from the Court’s holding in Monell v. Dep’t of Soc. Serv., 436 U.S. 658 (1978), which provides, “[o]ur analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies.” Defendants have identified a line of case law in which Section 1983 does preclude a “sovereign” from suing. However, Section 1983 does not include counties and municipalities within its definition of a “sovereign”, as the case law Defendants identified referred to foreign nations and Indian tribes. See Inyo Cty. v. Paiute-Shoshone Indians, 538 U.S. 701, 708-12 (2003) (holding that a Tribe is not a “person” capable of bringing a claim under Section 1983); Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th

Cir. 2005) (holding that the Tribe could not sue under Section 1983 because it was suing in its capacity as a sovereign).

In addition, the Court has recognized that even a “sovereign” may assert claims under Section 1983 where the nature of its claim qualifies it as a ‘person’ entitled to redress. Inyo Cty., 538 U.S. at 711; Georgia v. Evans, 316 U.S. 159, 160-163 (1942); Pfizer Inc. v. Gov’t of India, 434 U.S. 308 (1978). In Pfizer Inc., the Court held that a foreign nation, as a purchaser of antibiotics, ranked as a “person” qualified to sue pharmaceuticals manufacturers under U.S. antitrust laws. Id. Even if the County were to be improperly categorized as a sovereign rather than a person under the act, it should be allowed to seek redress as it is seeking to enforce its private right to be free from harm on the basis of its constitutionally protected association with religious organizations.

Defendants assert that the County has no First Amendment rights under which it may sue, but this assertion is based on Defendants’ unsupported opinion that the County is not a “person” under Section 1983. The County has established that it does qualify as a person under the statute, such that liability under Section 1983 may be predicated on a theory of a First Amendment violation. In N.J.-P.A. Presbytery of Bible Presbyterian Church v. N.J. State Bd. of Higher Educ., 482 F. Supp. 968 (D.N.J. 1980), the court found that the freedom of religion under the First Amendment was exactly the type of right that Section 1983 was intended to protect, issuing an injunction following a Supreme Court action that forbid a religious school from teaching. The court observed, “[The] highest in the pantheon of civil rights guaranteed by the United States Constitution are the right to be free of laws prohibiting the free exercise of religion.” Id. at 978 (citing to Wisconsin v. Yoder, 406 U.S. 205 (1972)).

C. The Full Faith and Credit Clause is inapplicable.

As described above, the County's federal claim is wholly different from the prior state action, so it is beyond dispute that it is not barred by the Full Faith and Credit Clause which provides no basis for dismissal. Accordingly, the County's claim should proceed.

D. The County is authorized to seek its injunction.

In Mitchum v. Foster, 407 U.S. 225 (1972), the court held that Section 1983 actions are within the exception to the holding in Younger v. Harris, 401 U.S. 37, 55 (1971), that injunctive relief in civil rights cases must be "expressly authorized by Act of Congress". Defendants fail to explain why the County should not be entitled to the relief which is clearly authorized under the statute. Therefore, Defendants' motion to dismiss should be denied.

POINT III**THE COUNTY IS ENTITLED TO PURSUE ITS CLAIMS
AGAINST THE NAMED DEFENDANTS.**

Defendants ask the Court to find that the County failed to join the New Jersey trial division, the New Jersey Supreme Court, or the State of New Jersey as necessary parties. They simply ignore Fed. R. Civ. P. 19(a)(1)(A), which defines a necessary party as one in whose "absence, the court cannot accord complete relief among existing parties." They also fail to address Fed. R. Civ. P. 19(a)(1)(B), which provides that, if feasible, an absent party must be joined to an action only when "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest."

In doing so, Defendants ignore the "claimed interest" clause of Rule 19. See Ward v. Apple Inc., 791 F.3d 1041, 1048 (9th Cir. 2015) ("[a]ccording to Rule 19's text, two conditions must be satisfied for a party to qualify as a 'required party' under Rule 19 . . . First, the party must claim

an interest relating to the subject of the action.”) For example, in Incubadora Mexicana, SA de CV v. Zoetis, Inc., 310 F.R.D. 166, 171-72 (E.D. Pa. 2015), the court distinguished that with respect to Rule 19, movants must show that the absent entities “in fact ‘claim an interest’ in the subject of this litigation such that their interests need protecting”.

Defendants simply cannot contend the New Jersey courts claim an interest in the action. While the New Jersey courts clearly serve as the vehicle for the Defendants claims, the Defendants have failed to satisfy the burden of demonstrating that the County did not join a necessary party.

CONCLUSION

Accordingly, the County respectfully requests that this Court grant the relief set forth in Plaintiff’s Order to Show Cause.

Applicant Details

First Name **Aryeh**
 Last Name **Rosenfield**
 Citizenship Status **U. S. Citizen**
 Email Address aryeh.rosenfield@wustl.edu
 Address

Address
Street
7245 Balson Ave. 1E
City
University City
State/Territory
Missouri
Zip
63130

Contact Phone Number **4013909229**

Applicant Education

BA/BS From **Yeshiva University**
 Date of BA/BS **May 2017**
 JD/LLB From **Washington University School of Law**
http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014
 Date of JD/LLB **May 14, 2021**
 Class Rank **I am not ranked**
 Does the law school have a Law Review/Journal? **Yes**
 Law Review/Journal? **No**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial
Internships/ **No**
Externships
Post-graduate
Judicial Law **No**
Clerk

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship in your chambers, beginning in 2021. I am currently a rising third-year law student at the Washington University School of Law, where I am a Staff Editor of the Washington University Jurisprudence Review.

Enclosed please find my résumé, transcript, and writing samples. The following individuals have written letters of recommendation that are included with my application materials.

Professor Greg Magarian
Washington University School of Law
gpmagarian@wustl.edu
314-935-3394

Professor Scott Baker
Washington University School of Law
bakerscott@wustl.edu
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Professor Ann Shields
Washington University
School of Law
ashields@wustl.edu
314-935-7373

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Aryeh Rosenfield

ARYEH ROSENFELD

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EDUCATION

Washington University School of Law St. Louis, MO
Juris Doctor Candidate | GPA: 3.60 May 2021

Honors and Activities: *Washington University Jurisprudence Review*, Staff Editor; Dean's List, Fall 2018; Scholar in Law Award (93% tuition merit-based scholarship)

Yeshiva University New York, NY
Bachelor of Arts in Music | Minor in Political Science | GPA: 3.31; Major GPA: 3.67 May 2017

Honors and Activities: Study Abroad, Jerusalem, Israel; Yeshiva University Music Club, President; Alpha Epsilon Pi, Jewish Life Chair; Yeshiva University Rock Ensemble (new ensemble within Music Department), Founder, Director, Bassist; Yeshiva University Baseball Team; WYUR Radio (student radio station), Host

WORK EXPERIENCE

Washington University First Amendment Clinic St. Louis, MO
Student Aug. – Nov. 2020

- Interview clients, assist with discovery, conduct research, and write briefs in cases involving the freedoms of speech, press, or assembly

St. Louis City Counselor's Office St. Louis, MO
Legal Intern June – July 2020

- Assisted attorneys with ongoing litigation by drafting court documents and researching legal issues
- Drafted memoranda on commonly occurring ethics rules concerns to provide guidance for attorneys

United States Attorney's Office, District of Rhode Island Providence, RI
Legal Intern June – Aug. 2019

- Researched legal issues to assist attorneys with writing motions, filing indictments, and preparing for trial in both civil and criminal matters and wrote memoranda on my findings
- Evaluated documents and data to ensure accuracy prior to filing with district court
- Gained courtroom experience by attending and observing courtroom proceedings

Adler's Hardware Providence, RI
Warehouse Receiver Aug. 2017 – June 2018

- Received, inventoried, and stocked incoming shipments

Shir Soul Sound Teaneck, NJ
Audio Technician May 2016 – July 2017

- Engineered recording sessions for studio clients and produced the resulting recordings to prepare for mastering
- Set up and broke down sound systems and mixed audio at live events to ensure ideal sound quality
- Filmed and edited music videos to prepare them for uploading to the internet

Rhode Island Commission for Human Rights Providence, RI
Intern June – Aug. 2013

- Read, summarized, and presented discrimination claims to state commissioners to enable them to decide whether to dismiss a complaint or to allow it to proceed

SKILLS & INTERESTS

Pro Tools | Band-in-a-box | Basic iMovie | Collecting American Coins | World History

Aryeh Rosenfield
Washington University School of Law
Cumulative GPA: 3.60

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts	Norwood	A	4	3.94
Legal Practice I	Shields	B+	2	3.46
Constitutional Law	Magarian	A-	4	3.64
Contracts	Baker	B+	4	3.46

Dean's List

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Practice II	Shields	B+	2	3.40
Criminal Law	Inazu	B+	4	3.46
Civil Procedure	Hollander-Blumoff	B+	4	3.46
Legal Research Methodologies	Bondareff	CR	1	
Property	Helmholz	A-	4	3.64

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Drobak	A-	3	3.58
Federal Income Taxation	Wiedenbeck	A-	4	3.70
Analysis I	Duane	A	3	
Evidence	Rosen	A-	3	3.70
Jurisprudence Review		CR	1	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Music in the Romantic Era	Stefaniak	A	3	
Jurisprudence Review			1	
Introduction to Law Firm Practice	Downey	B+	1	3.52
Supreme Court Simulation	Smith	CR	2	
Legislation	Magarian	CR	3	
Religion and the Constitution	Inazu	CR	3	

The School of Law changed to a pass/fail grading system due to the pandemic.

Washington University in St. Louis

SCHOOL OF LAW

January 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Aryeh Rosenfield

Dear Judge Hanes:

I am happy recommend Aryeh Rosenfeld for the position of law clerk in your chambers beginning in the fall of 2021. I have known Aryeh since he was a student in my Legal Practice class at Washington University School of Law during the academic year 2018-2019. I have been continually impressed with Aryeh's maturity and professionalism.

Through both small classroom discussion and office conferences, I was fortunate to interact with Aryeh on a personal level. He was always well prepared for class and able to engage in thoughtful dialogue that advanced class discussions. His assignments were always complete and submitted in a timely manner.

From the beginning, Aryeh grasped the importance of digging deeper than superficial readings of holdings and rationales to adequately analyze the precedential value of cases to his analysis. Aryeh also recognized the importance of strong research and writing to his success as an attorney and dedicated himself to developing these important skills.

In preparation for one-on-one writing conferences, Aryeh created well-developed drafts and formulated questions that revealed his thorough review of the relevant legal authorities for the issues he was addressing. Aryeh's inquiries during our conferences frequently went beyond specific assignments and reflected a broader concern in comprehending the underlying reasons for a suggested approach so that he is better able to identify when that approach will be beneficial in the future.

Finally, academics aside, Aryeh is a delightful person. He is a pleasure to work with and know. He is personable, dependable, and motivated. I believe these qualities make Aryeh an ideal candidate for a clerkship. Please contact me if you have any questions regarding Aryeh's wonderful qualifications.

Best regards,

/s/

Ann Davis Shields
Professor of Practice

Washington University in St. Louis School of Law
One Brookings Drive, Campus Box 1120
St. Louis, MO 63130
(314) 935-6420

Ann Shields - ashields@wustl.edu

Washington University in St. Louis

SCHOOL OF LAW

January 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Aryeh Rosenfield

Dear Judge Hanes:

I write to recommend my student, Aryeh Rosenfield, Washington University School of Law class of 2021, for a position as a law clerk in your chambers beginning in the summer or fall of 2021. Aryeh is a strong student who has ample talent to thrive in a clerkship setting. His ability and work ethic ensure that he will make valuable contributions to the legal profession.

I had the pleasure of teaching Aryeh in my first-year Constitutional Law course in 2018. He performed very well on the exam, achieving a solid A minus. His exam shows a clear, concise writer and an adroit legal analyst. He understands how to identify the core issues in a legal dispute and how to accurately apply the relevant legal principles. He has, in short, the skill set of an exemplary law student. His overall law school record bears out his success in my course. He has also earned a position as a staff editor on the *Washington University Jurisprudence Review*.

Aryeh earned his undergraduate degree from Yeshiva University with an intriguing major-minor combination of music and political science. He creates his own music on the computer, and he has worked as an audio technician for studio recording and live performances. He has deep roots in New England and a broad knowledge of the wider world, having studied in Israel for a semester in college.

The detail about Aryeh's background that jumps out at me is his job between college and law school: He spent nearly a year working as a warehouse receiver for a hardware store. That's a kind of work that not many bright young law students have experienced. Doing such work can keep people humble and grounded. Certainly Aryeh has those qualities.

I have enjoyed getting to know Aryeh. He is a down-to-earth person with a very pleasant manner. He has a good sense of humor and a positive outlook. When he visited my office as a Constitutional Law student, he consistently asked smart, thoughtful questions. I think he will adapt very well to the close quarters of a judge's chambers, and he strikes me as a person who will be able to work smoothly not only with a judge but also with the judge's other clerk(s) and staff.

Aryeh's interest in politics and government informs his professional interests. He wants to pursue government work, ideally as an Assistant U.S. Attorney. He spent last summer in the U.S. Attorney's Office in Providence, and he greatly appreciated the opportunity to be in court every day. He has a high degree of intellectual curiosity, and he is very enthusiastic about the prospect of working closely with a judge. Extremely bright and hard-working, Aryeh will render great assistance to the judge who hires him. I respectfully urge you to give him your most serious consideration.

Sincerely yours,

/s/

Gregory P. Magarian
Professor of Law

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Gregory Magarian - gpmagarian@wustl.edu - (314) 935- 3394

Washington University in St. Louis

SCHOOL OF LAW

January 28, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Recommendation for Aryeh Rosenfield

Dear Judge Hanes:

I write to recommend Aryeh Rosenfield for a clerkship in your chambers. I had Aryeh for contracts in his first semester of law school. Aryeh performed well in class. He answered my questions with care and attention. He received a 3.46 in the course, which put him in the middle of the class.

I cold-called on Aryeh for a case called *Levine v. Blumenthal*. This case involved a modification of lease agreement. During the Great Depression, the landlord agreed to a reduction in the tenant's rent if the tenant did not breach and close up his shop. Later on, the landlord sued, claiming that his promise to reduce the rent was not supported by consideration. The court applied the pre-existing duty rule, finding that the tenant had not promised anything "new" in return for the rent abatement and, as a result, the landlord's promise was unenforceable.

Aryeh described this case with detail. He was able to explain the court's reasoning. More, he was able to articulate the costs and benefits of rule (modifications will not be enforced absent fresh consideration) as opposed to a standard (modifications will be enforced so long as the new agreement is fair and equitable). Especially in the first year, many law students prefer rules to standards. They believe that the law is a system of rules to be memorized. By contrast, Aryeh was able to see that rules can be both over and under-inclusive. He was also able to see that standards while more flexible, create their own problem: uncertainty in application.

Outside of class, I have spoken to Aryeh on a number of occasions. He is always pleasant. He clearly enjoys law school and the friends he has made here. Given his disposition, I suspect Aryeh would be a team player in any chambers – a real joy to work with.

If there is anything else I might be able to tell you about Aryeh, please don't hesitate to contact me at the number listed below.

Sincerely,

/s/

Scott Baker
William F. & Jessica L. Kirsch Professor of Law

Washington University School of Law
One Brookings Drive, Campus Box 1120
St. Louis, MO 63130
(314) 935-6420

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ARYEH ROSENFELD

7245 Balson Avenue #1E, University City, MO 63130 | 401-390-9229 | Aryeh.Rosenfield@wustl.edu

Writing Sample

The attached writing sample is based on a Legal Practice assignment I completed during the Fall 2018 semester. I represented an associate at a law firm who was assigned to investigate the potential outcome of a new client's case. The purpose of the assignment was to research and draft a memo addressing whether a Texas court would find causal connection between an employee's alleged misconduct and subsequent adverse employment actions taken against her. In the interest of brevity, I have omitted the Statement of Facts. The pertinent facts are briefly as follows:

Caroline Collins was employed for several years as an Assistant District Attorney at the Fort Worth District Attorney's Office. When she became suspicious of a coworker's potentially illegal relationship with an intern, she reported the matter to her superior's. Subsequently, she began to be singled out for criticism during meetings and was eventually fired. Collins believed that the adverse employment actions taken against her were a direct result of her report of her coworker's misconduct.

The complete memorandum is available for review upon request.

Aryeh Rosenfield
Writing Sample

MEMORANDUM

From: Aryeh Rosenfield
To: Senior Attorney
Re: Caroline Collins; Whistleblower Claim; Client/Matter #18-372
Date: November 18, 2018

QUESTION PRESENTED

Would a court find causal connection between Caroline Collins' report of a coworker's alleged misconduct and subsequent adverse employment actions taken against her when she made the report to the District Attorney, Julie Melching, who subsequently called Collins a "loose cannon" and investigated the report herself, was singled out for criticism at training sessions led by Melching's mentor, and was told that she was fired due to being a "paranoid, myopic young attorney with poor judgement"?

BRIEF ANSWER

Yes, a court would most likely find causal connection between Collins' report and the subsequent adverse employment actions taken against her. Melching knew about the report, and there is evidence that Melching's mentor did as well. In addition, there is evidence that Melching expressed a negative attitude toward the report and failed to adhere to standard procedure when investigating it, and that Melching's mentor acted in a discriminatory manner towards Collins. Finally, there is evidence that Melching's stated reason for firing Collins was false.

DISCUSSION

The Texas Whistleblower Act states that "A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by... another public employee to an

Aryeh Rosenfield
Writing Sample

appropriate law enforcement authority.” Tex. Gov’t Code Ann. § 554.002(a) (West 2017).¹ The Act’s purpose is “to enhance openness in government and compel the government’s compliance with the law by protecting those who inform authorities of wrongdoing.” *Scott v. Godwin*, 147 S.W.3d 609, 621 (Tex. App. – Corpus Christi 2004). As a prerequisite to recovery under this Act, an employee must prove that there was a causal connection between their report of misconduct and subsequent employment action. *Texas Dep’t of Human Servs. v. Hinds*, 904 S.W.2d 629, 633 (Tex. 1995). This causal link requirement is necessary because without it, the Act read literally “would give public employees lifetime tenure for reporting activity believed in good faith to be unlawful.” *Id.* Per your instructions, this analysis will focus on whether we will be able to establish the requisite causal connection between Collins’ report of alleged misconduct and her firing from the District Attorney’s office.²

Circumstantial evidence can be sufficient to establish causal connection between an employee’s report of misconduct and an adverse employment action. When evaluating the quantity and quality of the circumstantial evidence, courts will look for:

(1) [K]nowledge of the report of illegal conduct [“Knowledge”], (2) expression of a negative attitude toward the employee’s report of the conduct [“Negative Attitude”], (3) failure to adhere to established company policies regarding employment decisions [“Breach of Established Policy”], (4) discriminatory treatment in comparison to similarly situated employees [“Discrimination”], and

¹ The law also states that an “employee who sues under this chapter has the burden of proof, except that if the suspension or termination... occurs not later than the 90th day after the date on which the employee reports a violation of law,” it is presumed that the action was taken in response to the report and the burden shifts to the employer. *Id.* at § 554.004(a). As Collins was fired on September 28, more than 90 days after she made the report on June 8, the burden of proof remains on her.

² The Whistleblower Act mandates that an “employee who seeks relief under this chapter must sue not later than the 90th day after the” adverse action occurred or was discovered by the employee. Tex. Gov’t Code Ann. § 554.005 (West 2017). As such, we must file Collins’ suit no later than December 27, 2018.

Aryeh Rosenfield
Writing Sample

(5) evidence that the stated reason for the adverse employment action was false [“False Reason”].

City of Fort Worth v. Zimlich, 29 S.W.3d 62, 69 (Tex. 2000) (“*Zimlich* Test”). Necessarily, Knowledge is a required element, while the remaining four components are factors that can be used to demonstrate causation. Collins’ e-mail to Melching on June 8th comprises incontrovertible evidence that Melching had Knowledge, and there is circumstantial evidence than Miller did as well. Melching expressed a Negative Attitude when she scolded Collins for failing to better investigate her suspicion and referred to her as a “loose cannon.” Melching breached established policy when she personally investigated the report instead of outsourcing the investigation. Miller subjected Collins to Discrimination when he singled her out for unprecedented criticism at consecutive training sessions. And there is evidence that Melching’s stated reason for firing Collins was false when she told her that she was a “paranoid, myopic young attorney with poor judgement.” Accordingly, we will most likely be able to establish causal connection between Collins’ report and her firing through circumstantial evidence.

Courts will find a causal connection between an employee’s report of misconduct and a subsequent adverse employment action when all five components of the *Zimlich* test are present. In *Town of Flower Mound v. Teague*, 111 S.W.3d 742 (Tex. App. – Fort Worth 2003), plaintiffs Teague and Burkett reported a fellow police officer for misconduct, and Teague began conducting a formal investigation. Two weeks into the investigation, the chief of police called Teague at his home at 10:00 PM and ordered him to end his inquiry. Several weeks later, Teague asked if the information he had found during his truncated investigation had been presented to the district attorney’s office, but it had not. Teague filed a complaint with the chief, who placed both defendants on administrative leave, citing a backlog of cases under their purview, and later fired them. However, another officer who was facing the same backlog was not disciplined. The

Aryeh Rosenfield
Writing Sample

court ruled that the evidence was sufficient to establish causation between the defendants' report and their firing. The court reasoned that since (1) it was undisputed that plaintiff Town of Flower Mound knew of defendants' report, (2) plaintiff expressed a negative attitude towards the report when the defendants were ordered to stop their investigation, (3) plaintiff did not adhere to its established policy when the chief called Teague's home to order him to stop his investigation and didn't submit defendants' documented evidence of the misconduct they reported to the district attorney's office, (4) there was evidence that the defendants were treated worse than similarly situated employees when they were put on administrative leave due to a backlog of cases while another officer was not, and (5) defendants were told they were being fired for "'gross dereliction of duty' and because they were not providing services to the Town's citizens," however the court concluded that "[m]uch of the evidence we have previously discussed, however, is evidence that these stated reasons were false." *Id.* at 757.

Texas courts look to the totality of the evidence to determine whether causal connection can be established under the *Zimlich* test. In *City of Fort Worth v. DeOreo*, 114 S.W.3d 664 (Tex. App. – Fort Worth 2003), defendant DeOreo reported her ex-husband and fellow police officer for aggravated kidnapping. A friend of her ex-husband was later appointed as Fort Worth's police chief, and she began to be subjected to frequent harassment by her superiors and coworkers. In one episode, DeOreo's captain ensured that she was the last officer dismissed from an emergency shift, long after the other officers on the shift were sent home. DeOreo later learned that her captain "had told the dispatcher to make sure that [she] was the last one relieved that night." *Id.* at 672. In a separate incident, DeOreo heard another officer state that "her mouth [was] always open bitching." At one point, DeOreo filed a sexual harassment report regarding another officer's conduct towards her, which her supervisors ignored. Eventually, DeOreo

Aryeh Rosenfield
Writing Sample

applied for a transfer to a different unit. While in fact, she was ineligible for the transfer because she would have had to resign from her current position prior to applying for the transfer, her captain incorrectly informed her that “if you were anyone else, your request would’ve been handled differently,” explaining that she had “the stigma attached to [her] because of” her report. *Id.* at 674-75. After ten months of suffering, DeOreo resigned her position and sued Fort Worth for constructive discharge under the Whistleblower Act. The court ruled that there was “some evidence of causation under the Act” *Id.* at 672, due to (1) the captain’s testimony that he knew of DeOreo’s report, and evidence that (2) the officer’s derogatory comment had been made regarding the report, (3) DeOreo’s supervisors ignored her sexual harassment report, (4) she had been the last officer to be sent home at the end of the emergency shift, and (5) reason her captain told her for the rejection of her application to transfer was false. *See also, Rogers v. City of Fort Worth*, 89 S.W.3d 265 (Tex. App. – Fort Worth 2002) (ruling that there was sufficient evidence that there was causation between a report and a subsequent adverse employment action when the employer (1) knew of the report, (2) ordered plaintiff Rogers to stop his investigation, (3) failed to adhere to established discipline policy, and (5) stated a false reason for plaintiff’s termination, however there was no evidence that (4) plaintiff was treated in a discriminatory manner in comparison to other employees).

In our case, it is clear that Melching had Knowledge of her report. As Collins’ initial report was made to Melching, it is undisputed that she knew about it. The facts that Melching and Miller were in frequent correspondence and that only Collins was singled out for criticism in Miller’s two training sessions between Collins’ report and termination provide circumstantial evidence that Miller also knew about Collins’ report.

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Writing Sample

There is less evidence that a Negative Attitude was displayed toward Collins' report than there was regarding the report in *Teague* and *Rogers*, however there is more evidence than in *DeOreo*. After informing Collins that the investigation into McGowan's behavior had been completed, Melching reproached her for impulsively filing a report, saying that the accusations reflected poorly on the department. Additionally, when Melching asked Nelson if Collins had discussed her report with her, Melching referred to Collins as a "loose cannon," a description which Nelson stated was in reference to Collins' report. These statements are not as pointed as the explicit order to halt the investigation in *Teague* and *Rogers*, but are much more directly related to the report than the officer's negative comment about the defendant in *DeOreo*.

There seems to be comparable evidence that the department failed to adhere to standard procedure regarding Collins' report as there was regarding Teague's and DeOreo's. In *Teague*, the chief called plaintiff Teague at his home to order him to halt his investigation "at 10 o'clock at night, something Teague had never experienced in his nineteen-and-a-half years in law enforcement." *Teague*, 111 S.W.3d at 756. DeOreo's supervisors simply ignored her report of sexual harassment. While Melching did not fail to follow procedure in the actual firing of Collins, she did so in her conducting of the investigation. Collins and Nelson both stated that when reports of misconduct are made, they are normally handed over to an outside investigator, and Melching would not generally have been involved. However, Melching alone inquired into the veracity of Collins' report, and concluded that Collins' suspicions were unfounded in a suspiciously short amount of time.

The evidence of Miller's Discrimination against Collins is comparable to *DeOreo* – and more compelling than in *Teague*. In *DeOreo*, defendant was singled out and required to remain on duty long after all other officers had been sent home from the shift. In *Teague*, the defendant,

Aryeh Rosenfield
Writing Sample

along with other officers, was placed on administrative leave, while other officers in the same situation were not. Hence, the defendant himself wasn't necessarily being singled out. However, Miller treated Collins differently from every other employee. Both Collins and Nelson asserted that employees at the District Attorney's office were never singled out for criticism at Miller's training sessions. Still, Collins was singled out by Miller at both of the training sessions after her report was filed.

Lastly, while there is much stronger evidence than there was in *Teague* that Melching stated False Reasons both for Collins not receiving her transfer and for firing Collins, her facts are very comparable to those in *DeOreo*. In *DeOreo*, the defendant was denied her requested transfer merely for procedural reasons, however her captain told her it was due to her report. Similarly, when Collins asked Melching why her transfer request was denied, Melching reported that it was due to Collins' poor work quality. However, Nelson, who conducted Collins' performance evaluations, asserted that the quality of Collins' work had not fallen during her tenure at the office, and Collins' transfer request was denied because there were no available positions in the unit to which Collins applied. Also, when Collins stormed out of Miller's training session, Melching told her that such behavior was unacceptable and fired her. However, Nelson has stated that emotions frequently ran high at the District Attorney's office, and it was not uncommon for people to storm out of rooms and slam doors as part of a disagreement. Finally, Melching's comment that Collins was a "paranoid, myopic young attorney with poor judgement" wouldn't seem to be in reference to her storming out of Miller's training session – it more closely would match a description of a poorly investigated report of alleged misconduct. While this evidence is circumstantial, taken altogether it is much stronger than the circumstantial

Aryeh Rosenfield
Writing Sample

evidence in *Teague* that the stated reason of a backlog of cases for the plaintiffs being placed on administrative leave and being fired was false.

CONCLUSION

In conclusion, we will most likely be able to establish causal connection between Collins report of her coworkers' alleged misconduct and the subsequent adverse employment actions taken against her. Melching, and possibly Miller, knew about her report, Melching made negative comments on multiple occasions regarding Collins' report, Collins was treated in a discriminatory manner compared to other employees when Miller singled her out for unprecedented criticism at consecutive training sessions, and Melching provided a false reason for Collins not receiving her transfer.

ARYEH ROSENFELD

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Writing Sample

The attached writing sample is an assignment I completed for a Supreme Court Simulation class I took in the Spring 2020 semester. For the class, I was assigned to portray Justice Elena Kagan throughout the semester. The final assignment was to write an opinion as our assigned justice in a case that the Supreme Court heard this past term. The following opinion was written as a majority opinion in a 5-4 ruling in *Trump v. Vance*. The dissenting opinion to which I refer was written by a fellow student portraying Justice Thomas.

Aryeh Rosenfield
Writing Sample

SUPREME COURT OF THE UNITED STATES

No. 19-635

DONALD J. TRUMP, PETITIONER *v.* CYRUS R. VANCE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

JUSTICE KAGAN delivered the opinion of the Court.

This case is about the complex relationship in our Constitutional system between the federal and state governments. In 2018, the New York County District Attorney’s Office (“Office”) began a wide-ranging criminal investigation into potential violations of state law by entities and individuals connected to the Trump Organization. As part of this investigation, the Office subpoenaed President Donald Trump’s accounting firm, Mazars USA LLC (“Mazars”), for financial and tax records for years both before and after Petitioner took office. We hold that neither Article II nor the Supremacy Clause of Article VI of the Constitution provides a blanket preclusion against a state grand jury subpoenaing the President’s records.

I

In the summer of 2018 Respondent, the District Attorney of the County of New York, and his Office opened an investigation into transactions spanning over a decade involving persons and corporations based in New York County. These transactions were connected in various ways to the Trump Organization (whose headquarters are in New York County) and were suspected of being in violation of state tax law. Soon after the commencement of the Office’s investigation, the

Aryeh Rosenfield
Writing Sample

Office deferred its investigation so as not to interfere with the ongoing federal investigation relating to Petitioner's former attorney, Michael Cohen.¹

In July 2019, the federal investigation concluded, *United States v. Cohen*, 2019 WL 3226988 (S.D.N.Y. July 17, 2019), allowing Respondent to resume his Office's state investigation. The following month, the Office issued a grand jury subpoena to the Trump Organization, seeking communications and financial records, including tax returns. While the Trump Organization complied with many of the subpoena's requests, it did not produce any tax returns.

The Office then issued a subpoena to Mazars seeking Petitioner's tax returns dating back to 2011. After the subpoena was served, but before Mazars complied, Petitioner filed for an injunction against the enforcement of the subpoena on the grounds that a sitting President has immunity against criminal process during his term in office. The District Court abstained under this Court's ruling in *Younger v. Harris*, 401 U.S. 37 (1971), that as a general rule, federal courts should not issue injunctions that interfere with ongoing state criminal proceedings. *Trump v. Vance*, 396 F. Supp. 3d 283 (S.D.N.Y. 2019). Although Petitioner disputed the existence of an ongoing criminal proceeding, the District Court noted "that New York law considers the issuance of a grand jury subpoena to be a criminal proceeding." *Id.* at 294. In so abstaining, the District Court rejected Petitioner's claim that Respondent was engaging in a bad-faith prosecution that, under an exception to *Younger*'s general rule, ought to be enjoined under *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

On appeal, the 2nd Circuit ruled that the *Younger* doctrine did not apply, citing this "Court's observation that allowing federal actors to access federal courts is 'preferable in the context of

¹ Cohen himself had pled guilty to violating campaign finance laws. *United States v. Cohen*, 366 F. Supp. 3d 612 (S.D.N.Y. 2019).

Aryeh Rosenfield
Writing Sample

healthy federal-state relations.’ *Trump v. Vance*, 941 F.3d 631, 637-38 (2nd Cir. 2019) (citing *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957)). On Petitioner’s claim of presidential immunity, the 2nd Circuit held “that presidential immunity does not bar a state grand jury from issuing a subpoena in aid of its investigation of potential crimes committed by persons within its jurisdiction, even if that investigation may in some way implicate the President.” *Trump*, 941 F.3d at 644. While the court reserved the question of whether a president could be criminally prosecuted while in office, at the grand jury stage prosecution “is purely hypothetical,” and “[t]here is no obvious reason why a state could not begin to investigate a President during his term and, with the information secured during that search, ultimately determine to prosecute him after he leaves office.” *Id.*

Finally, the 2nd Circuit rejected the argument raised by the United States as amicus curiae that in order to issue a subpoena to a sitting President, a prosecutor must make a heightened showing of need for the requested documents. The Circuit Court cited this Court’s rulings in *United States v. Nixon*, 418 U.S. 683 (1974), *Clinton v. Jones*, 520 U.S. 681 (1997), and *Cheney v. United States Dist. Court*, 542 U.S. 367 (2004), in holding that such a heightened standard is required only when the requested documents are protected by executive privilege. As the documents requested by the Office relate to Petitioner solely in a private capacity, they are not covered by executive privilege and Respondent need not make a heightened showing of need.

Petitioner asked this Court to reverse the 2nd Circuit’s holding and rule either that the President is completely immune from criminal proceedings while in office, or alternatively that Respondent must make a heightened showing of need for the records requested. We granted certiorari, 140 S. Ct. 659 (2019), and now affirm the ruling below.

Aryeh Rosenfield
Writing Sample

While this Court has heard cases stemming from a claim of presidential immunity on several previous occasions, the question before us today – whether a sitting president is absolutely immune from state criminal process while in office – is one of first impression.² However, our prior rulings on the presidential immunity show that its broad, yet limited scope does not cover the District Attorney’s Office’s subpoena to Mazars. While we do not declare today that a president never has a valid claim of immunity to shield him from compliance with state criminal process, several factors in the present case combine to make it clear that he does not have such a claim in this case: that Respondent’s investigation is still only at the investigative stage; the documents requested by the Office relate to private, unofficial conduct; and that compliance with the subpoena will not interfere with the President’s duties of office.

II

A

Petitioner alleges that a president has a categorical immunity from any criminal process (state or federal) which is rooted in “the text, structure, and traditions” of Article II of the Constitution. *Plaut v. Spendthrift Farms*, 514 U.S. 211, 218 (1995).³ This Court’s precedent cannot defend this claim. In *United States v. Nixon*, 418 U.S. 683 (1974), the President was required to comply with a subpoena directed to him as part of an investigation of which he was the target. And

² *Clinton v. Jones*, 520 U.S. 681 (1997), specifically reserved this question. “[I]t is not necessary to consider or decide whether a comparable claim [of immunity] might succeed in a state tribunal.” *Id.* at 691. Presciently, Justice Stevens surmised “that If this case were being heard in a state forum... petitioner would presumably rely on federalism and comity concerns, as well as the interest in protecting federal officials.” *Id.*

³ It did not escape the Court’s attention that these words, plucked from *Plaut*, were entirely divorced from their context as quoted in Petitioner’s brief, as *Plaut* was a case involving Congressional overreach. Justice Scalia had wrote that “Congress has exceeded its authority by requiring the federal courts to exercise ‘the judicial Power of the United States,’ U.S. Const. art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.” *Plaut*, 514 U.S. at 217-218. While Article II does have text, structure, and traditions, they are not the same as those of Article III.

Aryeh Rosenfield
Writing Sample

two decades later we reiterated that it is “settled that the President is subject to judicial process in appropriate circumstances.” *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

Certainly, Article II’s broad grant that “[t]he executive Power shall be vested in a President of the United States of America,” U.S. Const. art. II, § 1, places the President in a unique position within the structure of our federal government. It is the President alone who is responsible for the operation of the entire Executive Branch, including oversight of the military and the conducting of foreign diplomacy. *Id.* §§ 1-3. The need for the President to have extensive latitude in the performance of his duties provides him with long-recognized privilege which “is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974). Yet this immunity is not absolute. “In defining the scope of an official’s absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity’s justifying purposes.” *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982).

These justifying purposes are entirely related to ensuring that the President has the unfettered ability to perform his Constitutional and statutory responsibilities in manners in which he sees fit. “[W]e have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability.” *Clinton*, 520 U.S. 681, 693 (1997). Recognizing that “[t]he President occupies a unique position in the constitutional scheme,” *Fitzgerald*, 457 U.S. at 749, we have taken an expansive view of the extent of these designated functions, and treated “acts within the ‘outer perimeter’ of his official responsibility” as falling under the parameters of the privilege as well. *Id.* at 756. Yet “we have never suggested that the President, or any other official,

Aryeh Rosenfield
Writing Sample

has an immunity that extends beyond the scope of any action taken in an official capacity.” *Clinton*, 520 U.S. at 694.

B

Petitioner argues that impeachment is the sole remedy for any wrongdoing during the President’s term in office. That is true. The Constitution indeed stipulates that “[t]he President... shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors,” U.S. Const. art II, § 4, and subsequently “liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” U.S. Const. art I, § 3. But whether Respondent could indict, prosecute, or punish President Trump while he is in office are not questions before us today. Nowhere in the Constitution does it state or even imply that evidence against the President may not be gathered in preparation for potential litigation to take place after the President’s term is over.

The dissent claims that there is no meaningful difference between the investigation and prosecution of the President; that both have the tendency to subject the President to “untoward embarrassment or distraction,” “stress [he] will bear,” and have the “potential to consume [his] mind and time.” *Trump v. Vance*, 590 U.S. ___, 4-5 (Thomas, J., dissenting). But as pointed out above, the Constitution implicitly distinguishes between the pre-indictment and post-indictment stages of a criminal investigation. And the quoted tendencies simply do not rise to the level of an unconstitutional burden on the President’s ability to oversee the executive branch. The fact that a President may not actually face trial prior to leaving office does not categorically preclude his being required to comply with pre-indictment criminal process.

III

Having concluded that the issuance of the grand jury subpoena is not precluded by Article II, we now examine whether it is precluded by the Supremacy Clause of Article VI. While both the federal government and the states are sovereign entities, the Constitution mandates that the federal government is supreme over the states, the greater of two equals so to speak. The Supremacy Clause acts to prevent states from placing any obstacle in the way of the federal government performing its “legitimate operations.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). “It is of the very essence of [the] supremacy [of the federal government] to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.” *Id.*

It emerges, then, that the Supremacy Clause limits states’ wielding of their sovereign power only when such activities *actually* impede legitimate federal ones. “States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.” *Id.* at 436. As a result, the facts before this Court do not implicate the Supremacy Clause for two reasons: that the conduct being investigated by the Office is undisputedly not an exercise of legitimate federal power, and that no federal action will be impeded through compliance with the Office’s subpoena.

A

The Office’s subpoena is part of an investigation into potential violations of state tax law by someone who was a private citizen for the majority of the time period for which records were requested. Even for the years since Petitioner took office, potentially committing tax fraud is not

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an exercise of legitimate federal power. States do not violate the Supremacy Clause when they tax the salaries of federal officials; federal officials must properly file and pay taxes in their state of residence, the President included. *Graves v. New York*, 306 U.S. 466 (1939).

Petitioner argues that while the Supremacy Clause generally covers only official acts, the President is protected even for unofficial acts due to “his unique status and unrelenting duties.” Pet’r’s Br. 25. This Court has indeed acknowledged that “[t]he President’s unique status under the Constitution distinguishes him from other executive officials.” *Fitzgerald*, 457 U.S. at 750. But this observation supported shielding a sitting President from a lawsuit “for damages based on a President’s official acts.” *Id.* at 754. Not, as cited by Petitioner, to support a Supremacy Clause based immunity from a state criminal investigation relating to private conduct.

B

No action of the federal government will be impeded by compliance with this subpoena. While the President, not Mazars, is the party under investigation, the actual burden of complying with this subpoena falls entirely on Mazars. No federal official or agency is asked to do anything – the only action sought is for Mazars to turn over records. Petitioner is not being ordered to appear at a hearing or produce any documents in his possession. Mazars’ compliance with the subpoena would not have even the slightest impact on the functioning of any federal agency or the daily schedule of a single federal official.

The dissent rejects the distinction between the President and Mazars having to comply with the subpoena. “The general rule of the law is, that what one does through another’s agency is to be regarded as done by himself.” *Ford v. United States*, 273 U.S. 593, 623 (1927). This is certainly true regarding criminal accessory – the topic of *Ford*. But we are not concerned today with whether

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Writing Sample

as a matter of law President Trump is the true recipient of the subpoena. What matters for our analysis under the Supremacy Clause is whether the operations of the federal government would *in fact* be “retard[ed], impede[d], burden[ed], or in any manner control[ed],” *McCulloch*, 17 U.S. (4 Wheat.) at 436, by compliance with the subpoena. And on the facts before us, they would unquestionably not be, since no action is required of any federal official or agency.

In a striking attempt at *argumentum ad absurdum*, Petitioner claims that if we allow this subpoena to stand, the door would be open for every state and local prosecutor in the United States to initiate criminal proceedings against a sitting President. But the reason that it is the New York County District Attorney who is the Respondent in this case is because Petitioner was a resident of New York County during the years for which his tax records are being sought.⁴ The District Attorneys of Kings County, Richmond County, or any other county or parish in which he does not reside would lack jurisdiction to bring charges against Petitioner.

We rejected a similar line of reasoning in *Clinton*. Dismissing the concern that allowing Paula Jones to proceed with her civil suit against President Clinton would open the floodgates of private plaintiffs suing sitting presidents for civil damages, this Court found it “unlikely that a deluge of such litigation will ever engulf the Presidency.” *Clinton*, 520 U.S. at 702. There are vastly more potential civil plaintiffs than criminal prosecutors; it is extremely implausible that by declining to adopt a blanket rule against state and local prosecutors subpoenaing unofficial documents, a sitting President will be meaningfully distracted from his extensive executive duties.

⁴ Petitioner has since changed his primary domicile to Palm Beach County, Florida. Maggie Haberman, *Trump, Lifelong New Yorker, Declares Himself a Resident of Florida*, N.Y. Times, Oct. 31, 2019, <https://www.nytimes.com/2019/10/31/us/politics/trump-new-york-florida-primary-residence.html>.

Aryeh Rosenfield
Writing Sample

IV

As a last resort, Petitioner asserts that even if a sitting president is not completely immune from complying with subpoenas, Respondent must still make a heightened showing of need for the documents being sought. This Court's ruling in *United States v. Nixon*, 418 U.S. 623 (1974), is invoked as providing that a heightened showing of need must be made by a prosecutor even in the absence of a valid claim of privilege. This is an entirely incorrect interpretation of *Nixon*.

The *Nixon* Court accepted the need for the Executive Branch to keep its internal communications confidential as "too plain to require further discussion." *Id.* at 705. However, this privilege, while valid, is not unqualified, and the Court "conclude[d] that the legitimate needs of the judicial process may outweigh Presidential privilege." *Id.* at 707. The Court explicitly stated that "we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." *Id.* at 711-12. Such a balancing of interests was only necessary because the general privilege of confidential communications had been properly invoked.

Petitioner is correct that the *Nixon* Court had determined whether the Special Prosecutor had made a heightened showing of need prior to weighing these interests. However, this was in order to ensure that he had complied with the procedural requirements of Fed. Rule Crim. Proc. 17(c). The Federal Rules of Criminal Procedure only govern federal criminal proceedings. Respondent is not bound by them, and his compliance with New York's procedure rules is a matter for the state courts to ascertain.

V

The dissent protests that “[t]he President is indeed not above the law but he is not below it either.” *Trump v. Vance*, 590 U.S. ___, 14 (Thomas, J., dissenting). A properly worded maxim would read that “the President is indeed not below the law but he is not above it either.” As Chief Justice Marshall wrote when requiring President Jefferson to comply with a subpoena:

Much has been said about the disrespect to the chief magistrate, which is implied by this motion, and by such a decision of it as the law is believed to require. These observations will be very truly answered by the declaration that this court feels many, perhaps, peculiar motives for manifesting as guarded a respect for the chief magistrate of the Union as is compatible with its official duties. To go beyond these would exhibit a conduct which would deserve some other appellation than the term respect.

United States v. Burr, 25 F. Cass. 30, 37. We leave it to interpretation what other appellation the Chief Justice had in mind.

“[T]he longstanding principle that ‘the public... has a right to every man's evidence,’ except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings.” *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)). As we showed above, there is no claim of privilege available to Petitioner in this case. If, in the future, any subpoena is in fact so burdensome to the President as to impinge upon his Article II duties, he may challenge it on such grounds at that time. The same goes for a subpoena issued in bad faith, but there is no evidence that this one has been.

“[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.” *Nixon*, 418 U.S. at 710. “The exceptions furnished by the law of evidence, (with one only reservation,) so far as they are personal, are of those only whose testimony could not be received. The

Aryeh Rosenfield
Writing Sample

single reservation alluded to is the case of the king.” *Burr*, 25 F. Cass at 34. With our Constitution’s adoption of a republican form of government, this single exception was eliminated. Where there is no strain on the functioning of the federal government, let the search for truth not be derogated. We affirm the judgement below.

Applicant Details

First Name	Brian		
Last Name	Ruben		
Citizenship Status	U. S. Citizen		
Email Address	brian.ruben@vanderbilt.edu		
Address	<table> <tr> <th>Address</th> </tr> <tr> <td> Street 709 28th Ave N City Nashville State/Territory Tennessee Zip 37208 </td> </tr> </table>	Address	Street 709 28th Ave N City Nashville State/Territory Tennessee Zip 37208
Address			
Street 709 28th Ave N City Nashville State/Territory Tennessee Zip 37208			
Contact Phone Number	3104806547		

Applicant Education

BA/BS From	Arizona State University
Date of BA/BS	May 2018
JD/LLB From	Vanderbilt University Law School http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx
Date of JD/LLB	May 1, 2022
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Environmental Law and Policy Annual Review
Moot Court Experience	Yes
Moot Court Name(s)	2020 Vanderbilt Intramural Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Mayeux, Sara
sara.mayeux@vanderbilt.edu
Kutnik-Bauder, Jacqueline
jacqueline_kutnik-bauder@washlaw.org
Rubin, Edward
ed.rubin@vanderbilt.edu
615-322-5620

References

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San Francisco, CA
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1(415) 983-1252
(Former employer)

Jacki Langum
Director of Advocacy
ArchCity Defenders
St. Louis, MO
jlangum@archcitydefenders.org
(Former employer)

Joel Edman
Executive Director
Arizona Advocacy Network
Phoenix, AZ
joel@azadvocacy.org
1(480) 272-0731
(Former employer)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brian Ruben
709 28th Ave N
Nashville, TN 37208

June 3, 2021

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes:

I am a rising third-year student at Vanderbilt Law School seeking a clerkship in your chambers beginning in the fall of 2022.

I believe my extensive research experience will help me meaningfully contribute to your work. Before transferring to Vanderbilt, I conducted research for Professor Jodi Short at UC Hastings College of the Law on FERC's criteria for determining if a utility merger is in the public interest. Currently, I edit and perform background research for chapters on Professor Ed Rubin's forthcoming book on the relationship between modern democracy and the administrative state. Additionally, I serve as an Associate Problem Writer on the Moot Court Board and work as an Articles Editor for the Environmental Law and Policy Annual Review.

Enclosed please find my resume, my law school transcript, a writing sample, and a list of references. Thank you for your consideration. My recommendation letters will be arriving shortly from the following individuals:

Sara Mayeux
Associate Professor of Law and History, Vanderbilt Law School
sara.mayeux@vanderbilt.edu
(615) 322-2615

Jacqueline Kutnik-Bauder
Deputy Legal Director, Washington Lawyers' Committee for Civil Rights & Urban Affairs
jacqueline_kutnik-bauder@washlaw.org
(202) 319-1000 ext. 121

Respectfully,

Brian Ruben

Brian Ruben

BRIAN RUBEN

709 28th Ave N Nashville, TN 37208
(310) 480-6547 | brian.ruben@vanderbilt.edu

EDUCATION

Vanderbilt Law School, Nashville, TN

Doctor of Jurisprudence, expected May 2022

GPA: 3.281

Honors and Activities: ENVIRONMENTAL LAW AND POLICY ANNUAL REVIEW, ARTICLES EDITOR; Moot Court Board, Associate Problem Writer; Moot Court, Quarterfinalist; Pro Bono Pledge Award; Vanderbilt Bar Association, Transfer Student Representative

University of California Hastings College of the Law, San Francisco, CA

Juris Doctor, matriculated August 2019 – May 2020

GPA: 3.425; Top 30%

Honors and Activities: Alternate Dispute Resolution Team; INADR Law School Mediation Tournament, Two Top 10 Awards; Legal Research and Writing II, Best Oral Argument Runner Up; Hastings Public Interest Law Foundation Grant

Arizona State University, Glendale, AZ

Bachelor of Science in Sociology and Communication, May 2018

Honors and Activities: Dean's List; Center for the Study of Religion and Conflict Research Fellow Scholar; ASU West Research and Creative Project Symposium, Best Research Project

Thesis: *Rhetorical Analysis of Racial Identity in Christian Identity and Black Israelite Theology*

EXPERIENCE

ACLU of San Diego & Imperial Counties, San Diego, CA

Legal Intern: Conduct legal research, draft memoranda, and perform fact finding for cases involving civil rights issues at the U.S.-Mexico border. Summer 2021

Prof. Ed Rubin, Vanderbilt Law School, Nashville, TN

Research Assistant: Edit chapter drafts and conduct background research for a forthcoming book on the historical development of democracy and the administrative state. August 2020 - Present

Archcity Defenders, St. Louis, MO

Summer Intern: Assisted with legal research, discovery review, and editing memoranda for systemic litigation practice related to Eight and Fourteenth Amendment deprivations. Summer 2020

Prof. Jodi Short, UC Hastings, San Francisco, CA

Research Assistant: Conducted research on the legal and economic criteria used by FERC to determine whether proposed utility mergers are in the public interest. Summer 2020

Pillsbury Winthrop Shaw Pittman, San Francisco, CA

Practice Assistant: Helped with document production, deposition transcript review, and editing filings for attorneys in the Litigation and IP practice sections. September 2018 – June 2019

PERSONAL

Interests include skating, running, and Prog Rock.

OFFICE OF THE UNIVERSITY REGISTRAR
NASHVILLE, TENNESSEE 37240



Page 1 of 1

Name : Brian Ruben
Student # : 000742417
Birth Date : 08/16

Information contained in this document is confidential and should not be released to a third party without the written permission of the student.
This transcript is printed on gold SCRIP-SAFE® security paper.
A black and white document is not official.

Prior Degree(s)		LAW		Moot Court Board Member		2021 Spring	
Arizona State University	2018-05-07	Instructor:	5905	Susan Kay	1.00	P	0.00
Bachelor of Science		Instructor:	6080	Regulatory State	4.00	B+	13.20
		Instructor:	7038	Election Law Campaign Finance	3.00	B+	9.90
Arizona State University	2018-05-07	Instructor:	7180	Evidence	4.00	B	12.00
Bachelor of Science		Instructor:	7271	Holistic Defense Short Course	1.00	P	0.00
		Instructor:	7395	Environmental Annual Rev	1.00	P	0.00
		Instructor:	7700	The Practice of Aggregate Lit	2.00	A	8.00
Academic Program(s)							
Law J.D.							
Law Major							

Transfer Credit from Univ of California Hastings College of the Law
Applied Toward Law J.D. Program

		2019 FALL		2020 SPR		EHRS		QHRS		QPTS		GPA	
LAW	105	Civil Procedure	5.00			16.00		13.00		43.10		3.315	
LAW	110	Contracts	4.00			57.00		22.00		72.20		3.281	
LAW	125	Property	4.00										
LAW	131	Legal Research & Writing I	3.00										
LAW	115	Criminal Law	4.00										
LAW	123	Constitutional Law I	3.00										
LAW	130	Torts	4.00										
LAW	970	Legal Research & Writing II	3.00										
TOTAL:			30.00										

Law Academic Record (4.0 Grade System)

		2020 Fall					
LAW	5900	Moot Court Competition	1.00	P		0.00	
Instructor:		Susan Kay					
LAW	7073	Complex Litigation	3.00	B-		8.10	
Instructor:		Brian Fitzpatrick					
LAW	7204	First Amend Con Law	3.00	A		12.00	
Instructor:		Sara Mayeux					
LAW	7395	Environmental Annual Rev	1.00	P		0.00	
Instructor:		Michael Vandenberg					
LAW	7800	Research Asst for Credit	(1.00)			0.00	
Instructor:		Edward Rubin					
LAW	8040	Constitutional Law II	3.00	B		9.00	
Instructor:		James Blumstein					

	EHRS	QHRS	QPTS	GPA
SEMESTER:	11.00	9.00	29.10	3.233
CUMULATIVE:	41.00	9.00	29.10	3.233

Secure Electronic Ruben

Brian Ruben
brian.ruben@vanderbilt.edu

STUDENT IS ELIGIBLE TO ENROLL UNLESS OTHERWISE NOTED.
SIGNATURE IS WHITE WITH A GOLD BACKGROUND.
A RAISED SEAL IS NOT REQUIRED.

Bart P. Quinet

BART P. QUINET
UNIVERSITY REGISTRAR
Date: 06/03/2021



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
200 McALLISTER ST. • SAN FRANCISCO, CA 94102

STUDENT PERMANENT RECORD

NAME: Brian Ruben
Academic Program: JD

Printed: 13 Jan 2021 Page: 1 of 1
ID No.: 0583116

19/FA FALL 2019

CIVIL PROCEDURE	105	12	A-	R	5.0	5.0	18.50
CONTRACTS	110	12	B	R	4.0	4.0	12.00
PROPERTY	125	12	B+	R	4.0	4.0	13.20
LEGAL RESEARCH & WRITING I	131	27	A-	R	3.0	3.0	11.10
					16.0	16.0	54.80 3.425 3.425

20/SP SPRING 2020

CRIMINAL LAW	115	22	CR	R	4.0	4.0	0.00
CONSTITUTIONAL LAW I	120	23	CR	R	3.0	3.0	0.00
TORTS	130	22	CR	R	5.0	5.0	0.00
LEGAL RESEARCH & WRITING II	970	34	CR	R	3.0	3.0	0.00
					15.0	15.0	0.00 0.000 3.425

Comments

Spring 2020: COVID-19 Pandemic Semester - mandatory CR/NC grading for all classes.

Withdrew from UC Hastings on 08/05/2020.

CUMULATIVE TOTALS				
Cred. Att.	Cred. Cpt.	GPA Cred.	Grade Pts.	GPA
31.00	31.00	16.00	54.80	3.425

Gina Barnett
Gina Barnett, Registrar

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I highly recommend Brian Ruben, Vanderbilt Law class of 2022, for a clerkship in your chambers. Last fall, Brian was a student in my upper-level course on First Amendment law. Due to the coronavirus pandemic, this class was taught virtually over Zoom. Even in that format, Brian quickly stood out as an especially thoughtful and engaged student, volunteering often to share his insights and questions during our class sessions. He was among the students in the class who made teaching over Zoom feel more like an actual classroom community, with his frequent participation and good humor.

His academic performance in the First Amendment class was equally outstanding. In fact, he earned one of the top 3 grades in the class on his blind-graded final exam (out of about 40 students)—an impressive achievement for a transfer 2L, given that the course enrolls primarily 3Ls.

To prepare this letter, I also went back and reviewed Brian's contributions to our class's online "discussion board" throughout the semester. Two things stood out. First, Brian is adept at mastering complex, nuanced areas of constitutional doctrine such as free exercise or free speech. He reads cases carefully and understands how they apply, and his legal writing is clear and precise. Second, though, he is not merely a technically adept law student, but is also deeply engaged with the underlying political, philosophical, and moral questions at stake. Brian is an independent thinker with his own strong normative views—which he shared thoughtfully but forthrightly throughout our class discussions.

Yet, he equally appreciates the importance and value of engaging in open and genuine dialogue with those who don't share his views. "In our increasingly polarized discourse," he wrote in one post, "individuals have a tendency to write off speech that cuts against their preformed ideological positions. While ignoring such speech might be psychologically convenient and comfortable, engaging with speech we disagree with allows for an understanding of the nuances undergirding arguments on the other side..."

I think Brian's overall GPA, while very good (especially given Vanderbilt's grading curve, which is stricter than many of our peer schools), understates his potential as a future lawyer. He did very well his first year at UC Hastings, despite the upheavals of the pandemic which began his 1L spring semester. I cannot imagine it was easy to transfer to a new school and relocate across the country mid-pandemic, but he has continued to perform well in the classroom (virtual or otherwise) here at Vanderbilt. Of course, COVID-era transcripts are difficult to evaluate in general, given the mix of graded and pass-fail semesters and the context of general upheaval. Therefore, I encourage you to extend Brian an interview so that you can get a sense of his strengths in person, beyond his paper record.

In his time here at Vanderbilt, Brian has quickly established himself as a student leader and an active member of the student community—joining the Environmental Law and Policy Annual Review, winning a quarterfinalist spot in the Moot Court competition, and serving as the transfer student representative in the Vanderbilt Bar Association. He has also served as a research assistant for my colleague Ed Rubin, one of the most creative and wide-ranging thinkers on our faculty.

It is clear that Brian wants to use his legal education in the public interest, and more specifically, to pursue justice for marginalized and vulnerable groups. This theme stands out throughout his education so far, from his undergraduate internship with the Arizona Advocacy Network working on election issues, through his law school summer positions at the ACLU of San Diego and the Arch City Defenders in Missouri (among the most innovative criminal justice/indigent defense organizations in the country). He is now applying for clerkships because he understands that working closely with a judge offers the best possible preparation for launching a career in public interest advocacy and litigation.

Another benefit of hiring Brian is that he is simply an interesting person, with a friendly and offbeat manner and a real commitment to equal justice. From my own clerkship, one thing I remember most about chambers is just how much time the judge, chambers staff, and co-clerks all spend together each day, and how important it is for everyone to be kind and collegial.

Please do not hesitate to contact me if you have any further questions—I can be reached at sara.mayeux@vanderbilt.edu or by cell phone at (415) 260-3679.

Yours sincerely,

Sara Mayeux - sara.mayeux@vanderbilt.edu

Sara Mayeux

Sara Mayeux - sara.mayeux@vanderbilt.edu

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Brian Ruben for a federal judicial clerkship. Brian worked as a legal intern at ArchCity Defenders, where I was the Managing Attorney for Civil Rights and Systemic Litigation. During that time, Brian showed the intellectual curiosity and tenacity necessary to be an effective law clerk. He worked on highly complex § 1983 litigation that required him to review thousands of pages of documents relating to a 14th amendment conditions of confinement claim. That work required Brian to be highly organized, efficient, and detail oriented. Brian also did legal research to support the organization's litigation efforts. His work was always timely, cohesive, and easy to understand. More importantly, Brian was always willing to absorb critical feedback and use it to improve his work.

As Brian's academic record shows, he is an extremely capable student—having excelled at two outstanding law schools. Perhaps more importantly, Brian brings a breadth of experience to a clerkship position, having assisted with academic research, worked as a legislative intern, and obtained litigation experience through both a private firm and his work with ArchCity Defenders. His varied interests and experience are well suited to a judicial clerkship, where each case addresses distinct legal issues or areas of the law.

In short, I have no doubt that Brian would be an asset as a judicial law clerk.

Sincerely,

Jacqueline Kutnik-Bauder
Deputy Legal Director
Washington Lawyers' Committee
700 14th St. NW, Suite 400
Washington, D.C. 20005

Jacqueline Kutnik-Bauder - jacqueline_kutnik-bauder@washlaw.org

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I highly recommend Brian Ruben to you as a judicial clerk. He is currently enrolled in my Regulatory State class (a first year class we require transfer students to take), which is a large class being taught on Zoom, and has been meeting for only a week. But I know him quite well because he is serving as my research assistant this academic year. I hired him at the suggestion of Jodi Short at Hastings, and he's turned out to be an excellent choice.

I'm writing a book on the theory of democracy, and I asked Brian to assist me with my chapter on election law. Brian read the chapter, offered excellent editorial suggestions, and is now providing me with essential documentation for the chapter. He is both prompt and assiduous with everything I've asked him to do. In person (again via Zoom) I find him pleasant and engaging. In other words, I know him in a capacity that is more similar to being a clerk than a student, and he has been excellent in that role.

Please let me know if you would like any further information.

Sincerely,

Edward L. Rubin
University Professor of Law and Political Science

Edward Rubin - ed.rubin@vanderbilt.edu - 615-322-5620